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Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940 41

No. ~~133~~ 4

MAJOR RAYMOND LIENBA, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF CALIFORNIA

PETITION FOR CERTIORARI FILED JUNE 8, 1940.

CERTIORARI GRANTED OCTOBER 23, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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VOL. II

INDEX.

Record from Superior Court of Los Angeles County—Continued

Statement of evidence—Continued

Testimony of—Continued:

	Original	Print
Edward F. Lynch (recalled).....	1690	627
Mrs. Ethel Smith (recalled), (omitted in printing)	1703	
Willard L. Killion (recalled).....	1706	628
Edward F. Lynch (recalled)	1709	629
Willard L. Killion (recalled).....	1713	631
Dorothy Adams	1727	640
Charles H. Hope (recalled).....	1767	664
Willard L. Killion (recalled).....	1779	670
Sam Grant (recalled)	1795	679

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1940.

Record from Superior Court of Los Angeles County—Continued

Statement of evidence—Continued

Testimony of—Continued:

	Original	Print
Lois Wright (recalled) (omitted in printing)	1801	
C. Connie Zimmerman (omitted in printing)	1804	
Elaine Preston (omitted in printing) ..	1806	
C. Connie Zimmerman (recalled) (omitted in printing)	1812	
Sam Grant (recalled) (omitted in printing)	1816	
Motion to strike certain testimony	1864	680
Defendant's motion for directed verdict	1869	681
Testimony of Robert S. James (recalled)	1871	685
Joe Houtenbrink (recalled)	1884	691
Frank Weinberg	1895	697
Charles H. Hope (recalled) (omitted in printing)	1913	
Eva Murphy (recalled)	1921	698
Mrs. Pearl Wier	1941	705
Charles Martin	1947	709
Charles H. Hope (recalled) (omitted in printing)	1953	
Frank Weinberg (recalled) (omitted in printing)	1970	
Mrs. Eva Murphy (recalled) (omitted in printing)	1982	
Dr. F. L. Gassman (omitted in printing)	1988	
Frank Weinberg (recalled) (omitted in printing)	2001	
Louis Berry (recalled) (omitted in printing)	2028	
Robert S. James (recalled)	2034	713
Charles H. Hope (recalled) (omitted in printing)	2101	
Robert S. James (recalled)	2104	749
Dr. James De Witt George (recalled)	2177	782
Scott Littleton	2179	782
Ray O'Brien (omitted in printing) ...	2189	
Robert F. Herron	2197	784
Edward F. Lynch (recalled)	2198	785
A. Pruce Artran (omitted in printing)	2208	
Objection to exhibition of snakes in courtroom	2212	790
Testimony of Dr. A. F. Wagner (recalled)	2237	791
Jack Southard (recalled)	2240	793
Carl H. Scobie	2246	793
Mrs. Viola Pemberton (recalled) (omitted in printing)	2287	

Record from Superior Court of Los Angeles County—Continued

Statement of evidence—Continued	Original	Print
Stipulation re certain testimony at the inquest.....	2292	814
Testimony of Frank Weinberg (recalled) (omitted in printing)	2299	
Minute entry—presentment of indictment.....	2311	815
Indictment	2312	815
Minute entry—arraignment	2314	816
Minute entry—plea	2315	817
Order denying motion for severance	2317	817
Minute entries of trial.....	2318	818
Minute entry—verdict	2327	820
Verdict	2329	821
Minute entry—motion for new trial, etc.....	2330	821
Affidavit of R. E. Parsons in support of motion for new trial	2332	822
Affidavit of Wm. J. Clark in support of motion for new trial	2342	827
Minute entry—Continuance	2354	834
Minute entry—motion for new trial denied, judgment..	2355	834
Commitment	2357	835
Statement of grounds of appeal, etc.....	2363	838
Certificate of probable cause	2368	840
Clerk's certificate	2370	
Proceedings in Supreme Court of California.....	2375	841
Order of submission, March 10, 1937 (omitted in printing)	2375	
Order vacating submission, July 1, 1937 (omitted in printing)	2376	
Order of submission, November 16, 1937 (omitted in printing)	2377	
Order vacating submission, February 21, 1938 (omitted in printing)	2378	
Order of submission, March 21, 1939 (omitted in printing) ..	2379	
Order vacating judgment, April 20, 1939.....	2380	841
Order re bank calendar hearing..... (omitted in printing) ..	2381	
Substitution of attorneys..... (omitted in printing) ..	2382	
Petition for rehearing, October 25, 1939.....	2386	842
Affidavit and motion of Charles H. Hope filed in Superior Court	2523	920
Affidavit of Charles H. Hope filed in Superior Court....	2542	931
Letters, Charles H. Hope to Clerk and Judge of Superior Court	2552	937
Letter, Judge Fricke to Charles H. Hope.....	2558	940
Order denying rehearing	2560	941
Judgment	2561	941
Petition for appeal.....	2569	942
Assignment of errors and prayer for reversal.....	2570	942
Order allowing appeal	2575	945
Order staying execution	2577	946
Order staying mandate	2578	
Order re preparation of transcript (omitted in printing) ..	2580	
Certificate of Chief Justice of California.....	2582	947

	Original	Print
Opinion by the Court	2611	950
Dissenting opinion, Seawell, J.	2631	979
Opinion on rehearing.....	2703	1085
Dissenting opinion, Curtis, J.....	2723	1115
Citation and service	(omitted in printing) ..	2724
Order enlarging time	(omitted in printing) ..	2730
Praecipe for transcript of record (omitted in printing)	2733	
Clerk's certificate	(omitted in printing) ..	2738
Affidavit of Eugene D. Williams in opposition to affidavits filed in support of motion for new trial in Superior Court.	2739	1116
Defendant's requested instructions to jury.....	2744	1119
Order enlarging time	(omitted in printing) ..	2756
Statement of points to be relied upon and designation of parts of record to be printed	2757	1126
Stipulation as to record	2758	1134
Appellee's counter-designation of parts of record to be printed	2759	1135
Stipulation re printing of additional parts of record.....	2760	1139
Order allowing certiorari	2761	1140

[fol. 1699] EDWARD F. LYNCH, resumes stand.

Direct examination.

By Mr. Williams :

Q. Mr. Lynch, immediately prior to your being excused from the witness stand the other day, I asked you a question to which an objection was made, and I will now repeat that question for your information: "Turning to your notes and using them for the purpose of refreshing your recollection, will you state at this time who were present and what was said on that occasion?" That is referring to the occasion in the county jail on the 2nd of May, 1936, at about 11:45 A.M.

Mr. Clark: Just a moment. May I have that question, Mr. Reporter?

(Question read by the reporter.)

Mr. Clark: That is sufficient. To which we object on the ground that the question calls for evidence for which no foundation has been laid for its introduction in any of the following respects: In the first place, it is an attempt upon the part of the prosecution to prove the corpus delicti by the statements, declarations and admissions of the defendant, that no foundation has been laid by proving the corpus delicti other than by such statements, declarations and admissions. There has been a further failure to lay a foundation, in that it has not been shown that the defendant at that time was free to speak, or not, as he chose, but it [fols. 1700-1705] affirmatively appears from the evidence of the prosecution, itself, that he was not. I think those are the grounds of the objection. I had hoped that this question would not be re-asked until our rebuttal of the voir dire testimony counsel has produced was complete.

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[fols. 1706-1707] WILLIARD L. KILLION, recalled as a witness in behalf of the People, having been previously sworn, testified as follows:

Direct examination.

By Mr. Williams:

Q. Mr. Killion, when Mr. James suggested that he would like to have some attorney present, Mr. Parsons, there was an effort made to get in touch with Mr. Parsons?

A. Yes, sir.

Q. And did you get in touch with him?

A. We were not able to.

Q. Now, thereafter did Mr. James say anything that he didn't want to proceed without an attorney being present?

Mr. Clark: That is objected to as incompetent, and leading.

The Court: Overruled.

A. No, sir, he didn't say that.

By Mr. Williams:

Q. Did he thereafter ask for another attorney?

A. No, sir.

Mr. Williams: That is all.

Mr. Clark: That is all.

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[fol. 1708] The Court: Let the record show, Mr. Reporter, that the Court, after hearing the argument of counsel, has arrived at the conclusion and expresses the opinion that there is nothing in the record to sustain the conclusion that the declarations of the defendant in Mr. Fitts' office, or the transaction involving what has been referred to as the accusatory statement, or the response to the statement of Hope by the defendant—

Mr. Clark: If your Honor please, I am called out of the courtroom. And if counsel will represent the defendant in my absence—

The Court: There is nothing in either of these instances or the circumstances preceding them that warrants the conclusion that the defendant's conduct was involuntary or that it was not voluntary. I may say to counsel also, that

the Court has taken occasion, when it appreciated this question was coming up, to review not only the cases which have been cited here, but the body of the cases of California. And while it is true that we can't find the proverbial all fours case, in other words, another black and white cow upon a single railroad track, nevertheless the principles of law I think are very definitely stated and very definitely found.

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[fol. 1709] EDWARD F. LYNCH, recalled as a witness in behalf of the People, having been heretofore duly sworn, testified as follows:

The Court: The record will show that the jury has returned into the box and the defendant's counsel are now in court and Mr. Lynch is now returned to the witness stand.

Mr. Williams: In order to save time——

Mr. Clark: May I ask counsel to approach the bench for a moment?

Mr. Williams: Yes, you may.

(Conference at bench.)

The Court: Let the record show that during the recess, the question as to the admissibility of certain evidence already indicated, relating to declarations and statements and the conduct of the defendant in the county jail and in the District Attorney's office, have been ruled upon by the Court, as to the admissibility of that, the Court having held that these matters are admissible and reasonable in evidence. Mr. Clark has suggested that to permit the testimony to run a little bit more smoothly, that instead of inter-[fol. 1710] posing the objections in each instance where these matters are referred to, that the objection interposed just before the argument on the competency of the declarations made and for the same reason as heretofore stated, that record will show that unless it appears otherwise, that to all matters or declarations of the defendant subsequent to the time of his arrest, that this objection is made and that the defendant, in the Court's opinion has had the full benefit of that information.

Mr. Clark: Thank you, your Honor. I think we have saved at least a day's time in putting in these matters this way.

Direct examination.

By Mr. Williams:

Q. Mr. Lynch, will you, by referring to your notes, and reading therefrom, state what was said to and by the defendant on the occasion on May 2nd, 1936 at 11:45 A. M. in the county jail, of Los Angeles County when he was questioned by Deputy District Attorney Williams, and in the presence of Deputy Sheriff Virgil Gray, Mr. Killion, and Mr. Charles Hope and yourself?

[fol. 1711] A. "By Mr. Williams: Q.— James, do you know this man Chuck Hope? A— Yes, I know him. Q— Now, Chuck Hope told us this morning that on the 4th day of August, the day before your wife was killed, he came out to your house; that on the day before that, at your request, he had purchased and delivered to you three rattlesnakes; that he came to your house between 11 and 12 o'clock on the Sunday, the 4th of August; at that time, he went into the house, and you had your wife in the breakfast nook strapped or tied on the table with her mouth bound with adhesive tape and adhesive tape over her eyes; that he brought the rattlesnakes in and you put her left foot into the box of snakes with your hand and one of the rattlesnakes bit her.

"After that, he went away with your automobile and took the snakes and returned them to Snake Joe in Pasadena where he had gotten them. He came back about 1 o'clock Monday morning, that same night but after 12 o'clock, and at that time, he met you out in the garage, and you told him out there that your wife was not yet dead.

"He said that you had some drinks; that you left him; at 4 o'clock you came out and said—no, that is not correct—at 1 o'clock you told him you were going to drown her in the bath tub. At 4 o'clock you came out and told him she was dead. Then you went back into the house and about 6 o'clock or 6:30 you came into the garage again and told him she was dead, that you had the mess all cleaned up [fol. 1712] and for him to come in and help you carry her out.

"He went into the house. She was lying in the hallway between the bathroom and kitchen door. You picked up the head portion of her body. He picked up the feet or legs. You carried her out to the fish pond, right alongside of the fish pond and he laid her down alongside the fish pond. She was dead at that time.

"He left and went and got into the automobile. You stayed and put her body into the fish pond and then came out and got in the automobile. In the meantime, you had taken a lot of wet clothing and towels and put them in a bucket in the back of the automobile.

"You went down to his apartment where he was living near Virgil Street, and he took this clothing and told you he would get rid of it. That included several blankets, some towels, a sweater and other clothing, and he did get rid of it.

"He makes that statement. Have you got anything to add to it? By Mr. James: A— Nothing. Q— Nothing—that is all." End of statement, 11:50 A. M.

Q. Is that the entire statement, and every word that was said in your presence at that time?

A. Yes, sir.

Mr. Williams: You may cross examine.

[fol. 1713] Cross examination.

By Mr. Clark:

Q. Mr. Lynch, I may have asked you this already, but did you take down in shorthand everything that was said while you were in the room?

A. Yes, sir.

* * * * *

WILLARD L. KILLION, recalled as a witness in behalf of the People, having been previously sworn, testified as follows:

Direct examination.

By Mr. Williams:

Q. Mr. Killion, you have heretofore testified that about midnight on May 2nd, 1936, you and Deputy Sheriff Gray

and Investigator Davis, and a young lady you named, and the defendant, James, had dinner at a cafe at 5th and Figueroa. During that time was any statement made by the defendant to you concerning the matter of the death of his wife?

A. Yes, sir.

Q. Did you, at the time the statement was being made, make notes or memorandum of what was being said?

A. Yes, sir.

Q. And those were made by you at the very time?

A. Yes, sir.

[fol. 1714] Q. And if you need those in order to refresh your recollection in regard to any of the details, I am sure it will be proper for you to use those notes, but—

Mr. Clark: Before he does use them, I would like to examine them, and perhaps examine him on voir dire concerning them.

The Court: You may do so.

Mr. Clark: May I see the notes now, Mr. Killion? It will save time, perhaps.

A. These notes are some in shorthand, and some in long-hand, and some in scribbling.

By Mr. Clark:

Q. Do you write shorthand?

A. I did some years ago. Starting on this page, and ending on this, is the scribbling that I made at that time.

Q. Now, Mr. Killion, the pages you indicated, and that I hold in my hand, have they anything other than the notes to which you refer?

A. No.

Q. So that if these pages were cut out of the book, and filed here, we would have all of the pages, and you would still have the other matter available to you.

A. That is correct.

Q. If this should be filed here, would you prefer to have that done, rather than the whole book impounded?

A. Yes, as the other matters in the book have no bearing upon this.

[fol. 1715] Q. Now, the shorthand characters here were all written by yourself at that time?

A. Everything on those pages was written by me.

Q. The other matter is all in your handwriting?

A. It is.

Q. And all of this writing was done while you were in that restaurant?

A. Yes, sir.

Q. And the matter consists of 31 pages, as I count them?

A. Yes, sir.

Q. Now, was this all written at the same time?

A. All at the time we were in the restaurant.

Q. Was it all written with the same pencil?

A. No, I don't believe so. I used other pencils because of some of them becoming blunt; that is as I recall it.

Mr. Clark: I think that is all, except, if your Honor please, I would like to have the witness, when he finishes his testimony, take the pages out and have them filed for identification.

By Mr. Williams:

Q. Now, Mr. Killion, just give us as completely as you can everything that was said by the defendant, the questions that were asked him, and the entire conversation at the restaurant.

A. Starting at the restaurant, or before we went to the restaurant?

Q. Whenever the circumstances start, just state what [fol. 1716] they were?

A. The circumstances started in the District Attorney's office, the circumstances surrounding this statement.

Q. All right, just state what was said and done.

A. A short time before midnight, in the office next to the District Attorney's office, James said to me, in the presence of Mr. Gray, "Why don't we go out and get something to eat, and I will tell you the story." I said, "All right." Thereafter the person mentioned went in my automobile to the restaurant at 5th and Figueroa, and upon being seated I said to Mr. James, "Well, do you want to tell us the story now?", and he said, "No, let's have something to eat, first." So we ordered a dinner. As I remember, we had a steak dinner. After the dinner was finished we bought cigars. Mr. James had a cigar, and he said, "Now, you want to have this story?", and I said, "Yes." So, he said, "All right; there is no hurry, is there?" I asked him if he wanted to go back to the office to tell the story, and he said, "No, this is all

right, isn't it?" I said, "Sure, it is all right." So he said that about July 4th of this year—of 1935, I mean, was when Mary, his wife, had gone to Long Beach. He said that Charles Hope came to his, James' house, in La Canada, and at that time his, James', sister, Mrs. Murphy, was living there. James said that when Hope came he remembered the occasion, because of his having some game chickens, and Mrs. Murphy, his sister, was helping him [fol. 1717] with them in the garage. James said that Hope had no money, and no place to stay, and wanted to stay there. He said that Hope told him he had left his car down on Verdugo Road, and Mr. James said he noticed that Hope was drinking, in fact, he thought he was drunk, and that he didn't want Hope to stay there. He said that when Hope asked him if he could stay there all night, that since he didn't want him to stay, being drunk, he gave him a dollar to pay for a room in which Hope could sleep. Mr. James said that Hope came the next night about supper-time, and at that time he gave Mr. Hope a key to the place, and showed him the sun parlor as being the place where he could sleep, and that Hope stayed there on a Tuesday [fol. 1718] night. He placed the Tuesday night as being that of the Tuesday night after Mary had gone to the Dental Convention in Long Beach. He didn't know the exact date.

James said the next Thursday after that Tuesday, he was alone and about 2 o'clock—I mean he was alone at the Italian Village at Los Angeles, and he got drunk there and he met Madge Reed----

Mr. Clark: Just one moment, if your Honor please, I object to any narration of anything that the defendant said in regard to the Madge Reed or what occurred between the defendant and Madge Reed on the ground that it is irrelevant.

The Court: Objection overruled.

A. He said that he met Madge Reed and a blonde beauty operator at that place, and that after spending some time with them, they drove his car home, and that some place along the way, he doesn't know where, the blonde went away; that is she was not in the car anymore, and that he lost his memory then and didn't remember anything more until about midnight when his, James' wife, awakened

him by bathing his face with a wet cloth. He said his wife laughed and said, "Who was the woman that was here?" And he said he didn't remember. He said that his wife went back to Long Beach on Friday morning and that on Saturday, after that Friday, Madge Reed, came by his barber shop on 8th Street and she said to him, "You owe me three dollars. I spent that for cab fare and lunch", and that he gave her five dollars at that time and that he [fol. 1719] never saw her again until after Mary's death.

He said that Mary came from Long Beach on a Saturday and when she came she was sick, and on the Sunday following that Saturday his sister, Mrs. Murphy, was going back east and that he took her to the train on Sunday night. On Monday, following the day that Mrs. Murphy went east, that Mary was still sick and he took her to a Doctor George for examination. He said that they went to Santa Ana to get a marriage license and did get a license and were married on July 19th, and that after the time of their marriage on July 19th, that Mary was sick all the rest of the time of her life.

He said that he and Hope had talked about the insurance on Mary's life. He said that Hope knew she had the insurance because he, James had told him that she had \$5,000.00 insurance. He said that he and Hope drank together on many occasions. He said one thing Hope said, "Why don't you bump her off and get some money?" He said that Hope said, "Let me do it." He said that Hope would get drunk with him on many occasions, and each time they got drunk that they would talk about the insurance and about doing away with Mary. He said on one occasion, he and Hope discussed some way to get rid of her and Hope said, "Drive her out in a car and I will hold her up and shoot her", and Hope said, "There are many other ways. He said that about that time, Hope brought some stuff in some sacks. He thought it was rattlesnake poisoning in a powder form and that Hope [fol. 1720] thought it was deadly. At that time they got drunk again and nothing definite was decided upon. That Hope continued to see him, and that Hope told him and Mary that he, Hope, was a medical student, and that Mary wished to have an operation performed, that she didn't want to become a mother, and they talked it over in her presence and she had been learning that, she told him, it

seems, that she wanted Hope to do something to her to cause her to have a miscarriage.

About that time, James says he didn't remember the date, but he said that Hope was away for about a week and he came back and said, "Well, Mary was dying anyway. She is sick. Why don't you kill her and let us get the insurance?" And then he said that Hope sprang the rattlesnakes on him and told him about getting snakes. He said, "I will go out and get a rattlesnake that will kill her quick." He said on that occasion that they would get drunk again Hope said, "I will go and get a snake."

He said it was arranged and he gave him \$20.00 and that Hope came back with two boxes, two snakes in one box and one in another. They put the snakes in the chicken house and locked the chicken house. He said, "It must have been dog days, because those snakes wouldn't bite anything."

Then Hope got two snakes, he thought, in Venice, and at the time he got them he got a white rabbit and put the rabbit in the box with the snakes, and left that night—the night that they put the rabbit in the box with the [fol. 1721] snakes, Hope left the girl back to his hotel. He said he didn't know whether it was his girl or wife. In the morning, when he, James, looked at the rabbit and the snakes the rabbit was dead.

He realized he was doing the wrong thing and he said to Hope, "We are both nuts". Hope said he had to have some money. He said to James, "You have a job and I have nothing and we have gone so far now that we cannot quit. We have already committed a crime now with the thing we have done." He said, "You get a spider and try that", and he brought some spiders and when Hope brought them, that James threw them out and that there was nothing done with them.

A day or so after the spiders had been brought, Hope said he had found a place where he could get a real snake and Hope said to James, "Let me take your car in the morning and I can get them."

He said Hope took the car and went to some place in Pasadena and brought them to the barber shop and they went home together on Saturday night.

They took the snakes from James car and put them in Hope's car and drove to El Canada and then they got

drunk. And that was on Saturday night. He said that Hope and Mary talked about an operation, Saturday night, after they became drunk, Hope left. He, James, and Mary [fol. 1722] continued to drink on Saturday night, and Hope came on Saturday morning, and he was half tight, James said, and they got some more to drink, and got her tight. Hope said he was going to do the work, and James said that about 1:00 o'clock in the afternoon on Sunday, that he, James, took his automobile and drove away, after Hope had told him he was going to do the work. James said that he didn't know anything about any tape being used on Mary, but that he did know that Hope was going to kill Mary with the snakes within an hour. He said that he left at about 1:00 o'clock, and came back about 3:00. He said that Mary was apparently pretty sick and she didn't know what had happened, but she was in bed very drunk. He said that when he spoke to her, she said that she was very sick, but she guessed she would be all right tomorrow, and she kept calling for him, for James.

He said that he had Mary write the letter that had been—that was found on the table, the letter in the envelope addressed to Mary's sister in Nevada. He said that Hope then took the automobile and left, and James continued to drink all Sunday, and that Hope came back about 6:00 o'clock Monday morning and asked if Mary was dead, and James said "No, she is all right", and Hope asked, "Did the snake bite her?", and James said, he didn't know. James said, "She is all right." And Hope looked [fol. 1723] at her leg, which was black, and he told James that he turned the snakes out, and he said, "What will we do?" James said, "I am going to get drunk."

Hope told James to go ahead, and he would finish the job, and he said, "How are you going to do it?" "I will set the house on fire, and in that way we can get everything." He said, "We cannot quite now. They will know about the snakes." He said that Hope told him to go on to work, and that he was going to finish the work there. He said he got in his car and started to work, and he felt like taking a drive, and after he drove out on Wilshire Boulevard he then drove to his shop. He said that Hope came into his shop between 12:00 and 1:00 o'clock on Monday, and they went to Melody Lane for lunch. There Hope said to him, "Well, I got rid of her." James said, "You burned the house?", and Hope said, "No, I drowned her in the bath

tub." And James said, "Well, you are the craziest son-of-a-bitch I ever saw." He said they had a big argument there, and he told Hope, "Don't you know they will throw me in jail tonight?" He said, "I had a wife drown in Colorado in the bath tub, and I know I will be in jail.", and Hope said that she was too sick and drunk to know anything about it when he put her in the bath tub; he said that he put a belt around her arms, and tied her, and James then talked to Hope some more about the Colorado wife. James then said to Hope, "Well, I went in with you, and I will take the rap. [fol. 1724] I will have no defense." He said that at that time he gave Hope \$30.00. He had only \$40.00 with him, and he told Hope at that time, "I will take all the blame." Hope told James that he had cleaned the house up good, and had taken the blankets, and sweater, and so forth, to his house, and had burned them up, and he then told James that he had thrown the body of Mary into the fishpond. Hope said that he had taken all of the evidence to his, Hope's house, and destroyed it. James said he then stated to Hope, "You damned fool, did you burn up that stuff?", and Hope said, "Yes." James stated then that the woman—he said he didn't know whether it was his wife, or his girl, but he said, "She will spill everything.", and Hope said not to worry about her, that he had enough on her to hang her, told James that he and the woman went to a party on the Sunday night preceding the date on which they were talking, and that she knew all about it, anyway, but she would be afraid to talk. James said he had a notion to kill Hope, but was afraid that if he did that the woman would talk anyway, and he didn't want to have to kill them both. Hope told James that he took the snakes away, and while the woman was in the house at the party which they had attended, he turned the snakes out. He again assured James that he had enough on that woman to keep her from talking. Hope then told James while they were talking in the restaurant that some people had come while he, Hope, was in the house on Verdugo Road in La Canada trying to have [fol. 1725] the snakes bite Mary, but that he had had the blinds down, and the doors locked, and he was in there with Mary, and he didn't answer the summons that had been given at the door. James said, "That probably is when Ethel was there and left the note." Hope had told James that if he could kill Mary as he had, that they could get

double indemnity on the insurance, and they would split it 50-50. James said at that time he was afraid about what Hope had done, and thought he had better take some one with him when he went home, so he took Pemberton and the girl with whom he was keeping company, Viola Lueck, with him that night, as he didn't want to find her alone. He said, "The rest of it that Hope has told you is true." He said then he didn't see Hope any more from that day at lunch, which was Monday, August 5th, for about a month. He said Hope then began to come into the shop and mouch him for money. He said he had given him \$100.00 on Sunday, August 4th; he had given him \$30.00 when they had lunch; in the shop he had given him \$25.00 on one occasion, some other amount on others, and one time when he had returned from San Francisco he had given him \$100.00. He said that on an occasion or two he had a notion to kill Hope, but he knew that Mrs. Hope knew all about it, anyway, so he didn't want to do that. He said that Hope began to act very screwy in the shop, and he came in there and was talking about being picked up, so Hope told James that he was going to San Francisco again, and Hope was given \$25.00 by [fol. 1726] James to go to San Francisco. He said that when the insurance cases were over, when he, James, got the \$1700.00 insurance, Hope came to Los Angeles, and James gave him another \$100.00 and told him he would share the \$5,000.00 if he got it; that about two weeks before James was arrested Hope came one night, and was drunk, and was beefing, James said, and said that James told him, "Well, we played and lost." James said, "I am not going to be chiseled any more for money." Hope said, "If you don't give me some I will squeal." James said, "All right, squeal." He said, "Go ahead and squeal." James said, "Now, that is the story, and I never would have told it if Hope hadn't squealed. There isn't enough men in the District Attorney's office to make me talk." That is the end of the conversation that we had with James in the restaurant.

Q. Thereafter did you return to the District Attorney's office.

A. Yes, sir.

Q. Did you then have a conversation with Mr. Fitts and Mr. Stewart?

A. Yes, sir.

Q. Thereafter was the defendant questioned by Mr. Fitts in the presence of Mr. Stewart and Deputy Sheriff Gray and others?

A. Yes, sir.

[fol. 1727] Q. And did Dorothy Adams there take stenographic notes of what was said?

A. She did.

* * * * *

DOROTHY ADAMS, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Dorothy Adams.

Direct examination.

By Mr. Williams:

Q. Miss Adams, what is your occupation?

A. Statement reporter in the District Attorney's office.

Q. You will have to speak a little louder than you are talking now. You have been a statement reporter for a number of years, have you not?

[fol. 1728] A. Yes.

Q. In the early morning of May 3rd, 1936, did you take in shorthand a number of questions and answers in the office of Mr. Fitts?

A. I did.

Q. Who were present at that time?

A. Mr. Fitts, Mr. Stewart, Chief Plummer, Charlie Griffen, Jack Southard, Everett Davis, Mr. Killion, Mr. Gray, and myself.

Q. Did you take in shorthand every question that was asked, and every answer that was given?

A. Yes.

Q. Thereafter did you make a transcript in typewriting of your shorthand notes?

A. Yes, I did.

Q. Did the notes correctly reflect what you had heard?

A. They did.

Q. And did the transcript correctly reflect your notes?

A. Yes.

Q. Would it be more convenient for you to use the transcript to reflect your recollection in testifying to what was said?

A. Yes.

Q. Using the transcript, then, will you just state what was said, the questions and the answers, at that time?

A. "Statement of Robert James, made in the office of [fol. 1729] the District Attorney of Los Angeles County, Room 649 Hall of Justice, Los Angeles, California, at 1:55 A. M., May 3rd, 1936."

Q. Miss Adams, pardon me. I know it is difficult, but you will have to speak a little more loudly.

A. I will try. (Reading): "Mr. Fitts: Mr. James, the boys have told me that you told the story. Mr. James: They have got it. Q.—Will you just begin in your own way and tell me the story that you told them down there? A.—It's a long one; it will take three or four days. Q.—All right; go ahead. A.—I started it the week my wife went to Long Beach, which was around July 3rd or 4th. This fellow Hope came to my house and said he was out of work, broke, and his gal threw him out and he didn't have any place to sleep. He was drunk. He drove up to my garage where my sister and I were doctoring some chickens that had the roup. I wouldn't let him stay that night and gave him a dollar and told him to go somewhere where he could get a bed. I said, 'You get sober and come up tomorrow night. You are a good friend of mine and if you are in bad shape I'll let you stay here until you get on your feet.' He said, 'I'll be up here sober tomorrow', and so he did. He came up sober and stayed Tuesday night and Wednesday night. My sister was there. She met him and fixed our meals. Thursday night—"

Q. When was this?

A. I'm talking about the first of July on. [fol. 1730] Q. This conversation that you are giving us, when did that take place?

A. If you could tell me the date that she went to Long Beach on this convention which was around 1st to the 4th of July, I could tell you the exact date.

Q. It was on Thursday following the 4th of July, 1935.

A. As I said, he came up Monday night drunk after I had taken her to Long Beach Sunday.

Mr. Gray: July 4th, 1935, came on Thursday.

A. That is the wrong date, then. I took her to Long Beach on Sunday. It was earlier than the 7th.

Q. Could it have been the last day of June?

A. It must have been because she came back and was home a week before we were married and we were married the 19th.

Mr. Fitts: What convention was that?

A. It was a dental convention, and she had had a lot of dental work done, a special bridge, and they gave it to her free if she would model for them. She took a week off to go model. As I said, when I took her down Sunday, he came up Monday night. My sister was visiting me from Birmingham, and I gave him a dollar and said to come back the next night sober. He came back and stayed Tuesday and Wednesday night, and I gave him a key. He slept on a sleeping porch in front of the house. Thursday my sister said she was going to spend the night with Ethel—that's my niece. He wasn't coming home. He never came home all night; he may have gone and stayed the night with [fol. 1731] his girl. I didn't ask him. Thursday afternoon I went to the Italian Village and I got drunk. I didn't go back to my business. I met a couple of girls there and I danced with them all evening. I think it was about five o'clock when we left and I couldn't drive my car, and this girl said she was a good driver. She had not been drinking much, and I told her I would give her \$10 if she would drive me home. After we got in my car I got so drunk I passed out. She let this blond-headed girl out somewhere and she took me home and put me to bed.

Mr. Gray: Who was that girl?

A. That is that Reed woman, Madge Reed. She got hungry and went out and got herself something to eat. Naturally I went to sleep, and while I was asleep my wife came home. Some dentist who lived close to us decided to come see his folks and brought my wife home with him. She came in and saw this woman coming out of the bathroom. The woman said, 'Are you his sister?' That is what my wife told me. I was asleep and didn't know. She said, 'No, I'm not his sister; I'm his wife. Who are you?' She said, 'I'm just a friend of his. I brought him home, and he told me he lived here with his sister.' So she told her she was my wife and she took her to the bus in the car

to Montrose and put her on the bus. After putting her on the bus she came back home and I don't know, it must have been around midnight when she woke me up bathing my face with cold water. I said I was surprised to see [fol. 1732] her there, and she said yes, and she was surprised to see me here. I said, 'I wouldn't have been if I had not gotten drunk.' I said, 'I meant to go to a picture show and stay out late.' I said, 'You should have told me you were coming home,' and she said she didn't know she was coming home. She kept laughing and grinning and finally said, 'Who was the woman you had here?' I couldn't remember her to save my life. I think she knew the stupid condition I was in and was honest and hadn't any idea I had a woman there. She said, 'You had a very pretty brunette here', and she said, 'I took her down to the bus and sent her home.' So that was about all she said about it. She didn't seem to be mad. She wasn't a jealous woman.

Mr. Fitts: You are speaking now of Mary, your wife?

A. Yes. I believe it was Saturday this girl came by the shop—

Q. Meaning the Reed woman, now?

A. Yes. She said, 'You owe me \$3.00 for a taxicab. You nearly got me killed the other night. You told me your sister lived there. What did you tell me that lie for?' I said, 'I was drunk. I might have told you anything when I was drunk.' I said, 'You didn't go home in a taxicab; my wife told me she put you on a bus.' She said, 'I didn't go on a bus; I got a cab, but I spent a dollar for dinner,' and I gave for a \$5.00 bill and she told me how sweet my wife was to her. I said, 'I never did anything like that before [fol. 1733] and I suppose she knew I was drunk.' Then she left me. She got the money at the barber shop; I gave her a \$5.00 bill and she left.

Q. When did you first discuss with Hope the question of killing your wife, Mary?

A. When she was in Long Beach while he was there.

Q. While Hope was at your place and your wife Mary was at Long Beach?

A. Yes. Somehow or other he knew she had this insurance. Whether I told him or she told him I don't know. Anyway, he knew she had this insurance. After she came

back he knew she was very sick. He talked to me and said, "She is going to die anyway; why don't you kill her?"

Q. What did you say to that?

A. I told him I couldn't do it. He said 'Let me do it.' I said, 'How would you do it?' 'Well,' he said, 'I'll take her up here and I'll shoot her in a holdup.' I said, 'Yes, there have been a lot of people hung for that.' So he had some kind of a white powder in a box. I don't know what it was, but he said, 'I've got something right here. I have been working with a bunch of racketeers. You can just break the skin on your hand and rub a little bit on it and it will kill you in five minutes.' I thought it was ridiculous. In fact, he wanted me to get one of my chickens and try it on it. He was drinking and I didn't pay any attention. That is where he sprung the story on me about the rattle-[fol. 1734] snakes. I never saw a rattlesnake bite anybody. He said, 'These California rattlesnakes will kill you in fifteen minutes. I'll get a good couple of snakes and do the job myself.' It was agreed upon that I would give him half the money.

Q. Half the money with which to get the rattlesnakes?

A. No, that I collected from the insurance. I gave him \$20 and he went out, and the next day—

Mr. Gray: Just to interrupt you there, I think you will recall in your story before this point about the rattlesnakes, after he had talked to you about the powder, didn't you say that he went away for a little while and then he came back and told Mary that he had a medical student and could perform an abortion on her that she wanted performed? Isn't that correct?

A. Yes. When Mary came back from Long Beach she was pregnant and I don't recall just how he met her; it seems he came to the house and I introduced her. She asked me who he was and he told her he was a medical student and she asked me if he was, and I told her yes. After she had been sick there for quite a while she said she decided that she couldn't go through with having her baby. She said, 'I can't make it; my health won't permit it.' She wanted me to take her to a doctor. I was afraid to because she was in very, very bad shape. She said, 'Hope tells me he is a doctor. Why don't you let him take care of it?' I said, 'When I see him again I'll tell him

about it. That was when he disappeared and I didn't see him for a couple of weeks.

[fol. 1735] Q. That was in June or July?

A. July, after she came back from Long Beach. So Hope got to going out to the house and he talked with her, visited her, and told her he was a medical student. So it was finally agreed that he would take care of her. That is where his story comes in, on Sunday morning that he was supposed to have performed the abortion on her was the Sunday morning that if he put her foot in the box with the rattlesnakes, I didn't see it—was the morning he did it.

Mr. Fitts: Up to that time you two had agreed to have the snake bite her. Is that right?

A. Yes. He had gone out and got some; in fact he brought three up there.

Q. Those are the ones he got in Long Beach?

A. I don't know, he never would tell. He had certain kinds of boxes made and he brought them up in a box. It was dog days and they were blind. They wouldn't bite any one. He took them away and he brought two more back and they would bite but they didn't have anything in them.

Q. How do you know that?

A. Because he put rats, chickens, and a rabbit in the box with them. In fact he put a rabbit in the box with one of them and the next morning the rattlesnake was dead and the rabbit was walking around.

Q. That was the second batch. You bought three altogether?

A. Yes. I Laughed at him about his rattlesnakes and [fol. 1736] that was the time that I told him he would lay off of it. So he got a spell on him one day that he had found some hot ones. He said, 'I have found a fellow in Pasadena who has some that will really do the work?'

Mr. Grey: When did you bring the spiders?

A. That was somewhere in that time.

Q. Was that before you brought the last snakes?

A. Yes.

By Mr. Fitts:

Q. What kind of spiders?

A. He took my car. He got it one morning from the place where I was getting it greased. I think he kept it about

three days. He came back drunk. He told me a cock and bull story. He said he had gone to Phoenix to get these black widow spiders. He had a glass jar full and the top had holes in it.

Q. How long was that before you bought the third bunch of rattlesnakes?

A. That was just before he brought them. So he said, 'All you have to do is throw them in bed with her and they will bite her.- I laughed and threw his damned spiders out. He came over there to the shop and I said, 'Hope, you are nuts and so am I. Forget about it.' So he went away and he said he would. The next time I saw him he was drunk. He is nuts when he is drunk. He said, 'Come out here; I have a tip where I can get some hot snakes,' and I laughed at him. He said, 'All right, it will cost you \$6.00. You give [fol. 1737] me the \$6.00 and I'll go over and get them.'

Mr. Killion: When you had this conversation what was it you said to each other about having already committed the crime about doing what you had done with the snakes?

A. I didn't want him to get the other snakes. I said, 'We will fool around and get in trouble.' He said, 'We already are. We have been hauling rattlesnakes around in the car, which is a deadly weapon and a felony.' I didn't know anything about that. I said, 'No one knows it but you and I.' He said, 'I know it, and you aren't going to walk out on me now. You have a barber shop and you are making a living and I want to make some money.' I gave him the money and he goes over and gets the two hot snakes.

Q. What day was that?

A. Saturday night before she died Monday.

Q. How much did you give him?

A. \$6.00.

Q. Was his wife along at the time?

A. Yes.

Q. Does she know anything about that, what the snakes were to be used for?

A. To a certain extent. So he came back Saturday night and met me at the shop and he took me home and we got drunk together.

Q. Tell about the transfer of the snakes in the service station?

[fol. 1738] A. He brought the snakes back from Pasadena in my car. He put them in his coupe and followed me to

my house. I had a pint of whiskey. We drank and my wife drank with us. She dearly loved booze. No matter how sick she was she loved a drink. He had the two rattlers with him. He put them in the garage.

Q. Where?

A. The garage.

Q. What were they in?

A. In a wooden box with a glass top on it. I don't know where he got the boxes. He said he had them made somewhere. He had one in each box. So he put them in the garage and locked the garage up, and some time during the night he got in his coupe and left. He said, 'I'll be back up here in the morning.'

Q. And before he left that night, while you were drinking, he talked over with Mary again the performing of the abortion that night?

A. Yes, he promised that he would come back the next day and perform the abortion. So she was very happy to do it. So the next morning, I don't think I ever quit drinking. I think I drank all night, and I was pretty tight when he got there that morning.

Mr. Fitts: What time did he arrive?

A. Around 11 o'clock. I gave him practically all the money I had, and \$100, and I left, and as to what he told [fol. 1739] me about her being taped and tied up, I don't know. He took care of that himself. I left there about one o'clock and I think I returned about four. He said she would die in an hour, or fifteen minutes. I returned about four o'clock Sunday afternoon and I went in to see her and he had her full of liquor. In fact, he was very drunk himself. There were two or three bottles setting in the room where they had been drinking.

Mr. Killion: What did he tell you when you left at one o'clock? Did he tell you he was going to do the work?

A. Yes. I told him I couldn't have anything to do with it because she had been too good to me, and I just couldn't have anything to do with that part of it. I was very drunk and I got in my car and left, and I just drove around. I went back about four o'clock and asked him how she was. He was so drunk he hardly knew what he was doing himself. I stayed there a while and she didn't complain about anything bothering her at all.

Mr. Fitts: What was she doing when you got there?

A. In bed covered up. So he took the car and left and he stayed until about six o'clock the next morning.

Q. Where were the rattlesnakes at that time?

A. He took them with him.

Q. Did you see him bring the rattlesnakes in the house?

A. I didn't see them in the house. I saw them in the garage.

[fol. 1740] Q. Did he tell you he had her bitten by the rattlesnakes?

A. When I came back, he did.

Q. What did he say?

A. He said he put her foot in the box with one and it bit her three times. He said, 'I don't know what's the matter with her. Unless the snakes has bitten so many times he's not poison. It doesn't have any affect on her at all.' I talked with her and she was drunk.

Q. What did he say he had done?

A. He said he had inoculated her in the leg and performed the abortion and her leg hurt. She kept complaining and that was the first time I saw it after he left. His wife was waiting for him on the corner all the time in her car. He stayed all night. He left me with her. Naturally I was all upset and she and I just sat there and drank all night. I don't think she ever felt her snake bite. So he came back about six o'clock the next morning and her foot and ankle were swollen. I said, 'She's all right, nothing the matter with her,' and we talked her over and I said, 'What are you going to do about that? We had better call it off.' He said, 'We have gone too far. They will know it's a snake bite and she is going to talk, and we have gone too far to stop.' I said, 'What are we going to do with her?' He said, 'You leave that to me. You go on and go to work and I'll take care of her.' I said, 'What are you going to do with her?' And he said, 'I'll tell you what I'm going [fol. 1741] to do. She smokes a lot of cigarettes, and lots of people die by smoking in bed. I'll burn the house up.' I kept taking a few drinks and I got in the car and left about six o'clock.

Q. With the understanding that he was going to take care of her by burning the house?

A. That's what he said he was going to do. I went to work. Instead of driving on Wilshire Boulevard I drove

all the way to Sawtelle. I was drunk and was tryin to get sober. Finally I arrived at work a quarter of nine. I had some breakfast, and about one o'clock or a little after he came down to the shop and said, 'Everything's all right.'

Mr. Killian: He said he got rid of her, did he not?

A. We went to Melody Lane and had dinner and talked about it on the way back.

Mr. Fitts: Back where?

A. To the shop.

Q. When you say 'dinner' you mean lunch?

A. Yes, lunch. On the way back to the shop I said, 'Did you burn the house up?' and he said no. I said, 'What did you do?' He said, 'I threw her in the bath tub and drowned her.' I said, 'You God damned fool, that's the worst thing you could do.' He said, 'Why?' And I said, 'That's the worst thing you could have done. I had a wife drown in a bath tub in Colorado Springs a little while ago.' He didn't know that. If he had he wouldn't have done it. 'Well,' I [fol. 1742] said, 'you really played hell but it's too late now.'

Q. Because she was dead?

A. Yes.

Q. That is what he told you?

A. Yes. I said, 'What did you do with her, leave her in the bath tub?' And he said, 'No, I threw her in the fishpond.' I said, 'That won't stick. They will throw me in the jug when they find her. I'll be a good sport. You made a God damned fool of yourself and me both, but I'll take the rap. I won't talk. There ain't enough men in the District Attorney's office to make me talk,' and there wasn't if he had not told it. You never would have got me to talk. So of course I arranged for this couple to go home with me.

Q. Did they know anything about it?

A. No.

Q. They were perfectly innocent?

A. Absolutely. They don't know a thing about it.

Mr. Killian: At this time at the luncheon where you went to lunch together, did you give him some money?

A. I gave him all I had. I think I had \$40 and I gave him \$30 of it. I said, 'Here's all the money I have. You get the hell out of here and stay away. I'll take the blame'

for it and I won't talk. I was a God damned fool to get drunk and enter into a thing like this with you. If I had been in my right mind I wouldn't have done it. You have made a damned fool of us and I'll take the rap.' I said, 'I [fol. 1743] don't care about living anyway. Somebody is going to jail and it doesn't need to be both of us.'

Mr. Davis: James, in your story this evening you told us that certain evidence had been destroyed because of blood on blankets. Tell Mr. Fitts about that, will you?

A. Oh, yes. While we were at lunch he said, 'I cleaned up the house. I got water all over the floor of the bathroom. I had your sweater on. I mopped up with a few things, towels and things, and her foot had bled all over that bed.'

Mr. Fitts: What?

A. He said her foot had bled all over the bed.

Q. Where the snake had bitten her?

A. Yes. He said, 'I took your sweater and all the towels and the blankets and I straightened your house up good.' I said, 'What did you do with them?' He said, 'I took them over to the house and burned them.' I said, 'Are you sure you burned them?' I said, 'Are you sure?' And he said yes. I said, 'Hope, if you took that stuff over to your house where that woman of yours can get hold of them she will break your neck.' He said, 'I didn't; I burned them.' I said, 'Did you burn the blankets too?' He said, 'Yes. She wouldn't talk anyway. I have got stuff on her that she couldn't talk.' I said, 'What have you got on her?' and he said 'It's her business,' and I couldn't get it out of him. I don't know what he has on his woman.

Mr. Gray: Did he tell you that he had told her all about [fol. 1744] what happened?

A. He said he told her when he left Sunday night what had happened. He said they went to a party and while they was in the party he said the snakes were in the car. I knew what those snakes did, they rattled every few minutes. If you put one in the box it would get mad and rattle. I said, 'You don't mean to tell me you took those snakes along in the car with that woman and she didn't know what they were?' and he said 'Yes.' I kept arguing with him and he finally admitted to me that she knew about it.

Mr. Fitts: James, while you are making this statement let's clean it all up, if you will. Did you kill the girl back east in Colorado?

A. No, that was all on the level, absolutely.

Q. And your nephew in San Francisco?

A. I was here and he was up there.

Q. Did you have anything to do with that?

A. How could I?

Q. I am asking you?

A. You know how he got killed?

Q. Automobile accident.

A. Could I have had anything to do with that. My sister is crazy, and she's always had it in her mind. She is really insane. She has had it in her mind that I killed my wife in Colorado and her son and Mary.

[fol. 1745] Q. In other words, she has just been wrong on two of them, is that right?

A. Yes. The same thing is affecting her that is affecting me.

Q. You mean it is hereditary?

A. I think it is. I am anxious to find out.

Q. Let me ask you. You were at the point in your story where you were having lunch the day, Monday, of the killing of Mary, at which time you gave him \$30, and told him to beat it and not see you any more. He has been coming back to the shop frequently since then, hasn't he?

A. Yes. It seems like when I buried Mary—I went to the beach and stayed a month and I didn't see him then.

Q. This Miss Reed, you did see her at Hermosa Beach?

A. Yes.

Q. And you did offer her a thousand dollars to say she had seen Mary alive on Monday after you left for the shop.

A. I was drunk when I was with her and I was practically a blank and I might have offered her a thousand.

Q. The story that Dr. Densley has told about seeing your wife Mary around the house after six o'clock in the morning, he is clearly mistaken, isn't he?

A. I don't see how he could. Of course I wasn't there after six and I don't think in her condition she could have got up and gone out in the yard, and I don't think Hope would have let her.

[fol. 1746] Q. When you left for your shop Monday morning, and you left Hope and Mary there, you left with the idea that she was to be murdered by Hope?

A. That's what he said he was going to do.

Q. That was your idea?

A. Yes.

Q. And when you came home and found her in the fish pond you had been told in the meantime by Hope that he had drowned her?

A. Yes.

Q. When you first discussed and arranged between yourself, that is, Hope and yourself, the murder of your wife Mary, it was for the purpose of collecting the \$14,000 life insurance?

A. It wasn't \$14, it was \$10,000.

Q. \$10,000, and you were to take half of it, \$5,000, and Hope was to get half of it?

A. That's right.

Q. And it was in pursuance of that arrangement made in July sometime, that three different batches of rattlesnakes were purchased?

A. That's right.

[fol. 1747] Q. And it was further in pursuance of that agreement between you two that the third batch of what you call hot snakes were purchased by Hope and the story concocted and told to your wife that an abortion was to be performed?

A. That's right.

Q. And when the supposed abortion was being performed upon her it was not the idea of Hope or yourself at all to perform an abortion but to actually murder her for the purpose of the life insurance?

A. That is what he said he was going to do.

Q. And that was your understanding?

A. That's what he told me.

Q. And in keeping with that agreement between you two, you gave him \$20.00 one time to buy snakes, and \$6.00 another time, and on the day of the murder, \$100.00 and that \$100.00 you paid him was for the preliminary part of the murder of your wife Mary?

A. That's right.

Q. And have you ever told anybody about this? Have you ever discussed this with Lois? Did you ever admit to Lois that you had killed your wife?

A. Never.

Q. Or to anybody else?

A. Never.

Q. Is there anyone who knows anything about the facts in this matter other than you two?

[fol. 1748] A. Not a soul on earth unless he has let it out himself.

Q. Did you see the snake bite your wife?

A. No, he took care of that after I left.

Q. He told you that he had done so?

A. He told me that.

Q. And that was all right with you?

A. That was all right with me.

Q. This statement that you have made has been made freely and voluntarily?

A. Yes.

Q. No promise of immunity or hope of reward, or threats or duress held out against you?

A. I have told the true stuff.

Q. Freely, and it has been made by you?

A. Yes.

Mr. Killian: About the letter that was found on the table of the living room of your home. Will you tell Mr. Fitts about that?

A. She wrote it before I left home.

Q. She wrote it at your direction?

A. Yes.

Q. And you believe she wrote it because she was so intoxicated she wrote what you directed her to write?

A. Yes.

Mr. Fitts: That was the morning of the murder?

A. That's right.

[fol. 1749] Q. August 5th?

A. Yes.

Mr. Killian: Did Hope tell you that while he was in the house Sunday some people came?

A. Yes. When I got back to the house he was very nervous. He said, 'This is a hell of a hot place up here. There have been at least a dozen people around here.' I didn't know who had been around the house there except my niece and her husband and father-in-law and mother-in-law, and they were the ones who left the note there. It seems like one or two other people came there looking for Smith but he had the shades all down and the house locked. I was out in my car so naturally they didn't think we was home.

Q. After the conversation with Hope at lunch on Monday, you took Pemberton and Viola Lueck home with you because you knew you would find the body of Mary in the fish pond?

A. That's right.

Q. You were surprised that you had not heard during the day that somebody had found her, and you didn't want to find her alone?

A. I didn't believe he had put her in the water as he said, but that he had left her in the house.

Q. And that is why you brought them home with you?

A. Yes.

Q. And the story you have told us about Pemberton and Viola Lueck is true?

[fol. 1750] A. Yes.

Q. They knew nothing about the plans you and Hope had?

A. That's right.

Q. Concerning the money you gave Hope in addition to the amounts mentioned by Mr. Fitts, you have since given him various amounts of money when he came to your shop demanding money?

A. Yes.

Q. About how much?

A. When I had that insurance settlement I bought my place and gave him \$100.00.

Q. That was when he returned from San Francisco?

A. He said he had been there but I don't think he had ever been there. On several other occasions he came to the shop and demanded money. After I lost that insurance case he came to me there and told me his wife was in the hospital dying and he had to have \$75.00. I wouldn't give it to him. He begged me and begged me until I gave him \$2.00. I said, 'That's the last time you are going to get any money from me.'

Q. Did you have a conversation with him regarding what you would do in case you were successful in securing insurance on the second policy?

A. I told him I would give him half of it.

Q. If you got \$5.00 or \$10,000.00 you would give him half of it?

A. Yes.

[fol. 1751] Mr. Fitts: Hope says, Mr. James, that in the purchase of the second batch of rattlesnakes, he got those

at Ocean Park and that you went down there with him to get that batch.

A. He is lying about that to you. He never let me know where he got any snakes. I did know he got the last ones from Joe in Pasadena.

Q. How did you know that?

A. He told me.

Q. Have you ever gone down to the Ocean Park place and studied the habits of the rattlesnakes?

A. The one time I was in there.

Q. But you didn't go with him?

A. No, I didn't go with him.

Q. At any time?

A. No.

Mr. Killion: During this last conversation with him about the money, did he threaten to take some action in case you didn't give him some money?

A. Yes. When I told him I had given him all the money I was going to give him, he said if I didn't give him \$200.00 he said, 'Give me \$200.00 and we'll forget it all,' and I said, 'No, this is the last time I'm ever going to give you a dime of money.'

Mr. Davis: When you reached home on the evening of the 5th with the Pembertons, and you didn't find your wife in the house, where did you expect to find her?

[fol. 1752] A. Where he said he had put her.

Q. Where did you expect to find her when you didn't find her in the house?

A. In the fish pond.

Q. And did you go to the fish pond and look for her?

A. Not me. I went out the back way.

Mr. Killion: At what time of the morning did Hope tell you that he put the body in the fish pond?

A. He didn't tell me just what time. I believe he told me he put her in there around 11 o'clock.

Q. Did he ever make any threats to you about squealing on you if you didn't give him some more money?

A. I told him 'You don't need to think you are going to bleed me for money. We're all through. We played and lost and that's all. I'm never going to give you any more money.' He said, 'All right. I'm going to do some talking.' I said, 'You are just as guilty as I am. If you want to talk go ahead,' and I never saw him any more until today.

Mr. Griffen: Going back to Sunday afternoon, on August 4th, I believe you told Mr. Fitts that you went out riding in the afternoon in the car and you got back at 4 o'clock?

A. I think so. I didn't keep any particular time because I was drinking and I think I got back around 4 o'clock.

Mr. Fitts: Will you face Hope and tell him he killed your wife?

A. Yes.

[fol. 1753] 2:50 A. M. Chuck Hope was brought into the office.

Q. Mr. Hope, Mr. James has told us the story in detail about the rattlesnakes.

Mr. Hope: Yes, sir.

Q. That back in July, while his wife was at a convention, that you and he discussed the question of killing his wife with a rattlesnake.

A. No, sir.

Q. For the purpose of getting the insurance. That he paid you \$20.00 on one occasion, \$6.00 on one occasion, and \$100.00 on another occasion?

A. That is correct.

Q. For the purpose of buying rattlesnakes?

A. Yes.

Q. And for the purpose of killing his wife?

A. No, sir.

Q. For the purpose of killing some woman?

A. Yes, sir.

Q. You tell him what you told me, Mr. James.

Mr. James: He knows it. You don't have to tell him.

Q. You tell him just what you told me a moment ago.

Mr. James: He knows that he went out and got three rattlesnakes and they were blind and wouldn't bite and he got two more and they wouldn't bite a damned thing, and he said he knew where he could get some that would bite and he went to Snake Joe's and got them. You had just as well [fol. 1754] come on, boy, and tell them what they know.

Mr. Hope: The first two batches were bought for some friend of his who was going to kill his wife. I bought the snakes and delivered them to him. The third batch he told me he was going to kill his own wife, and he took those snakes home.

Q. You knew when you were buying them, the third batch, that it was for the purpose of killing James' wife?

A. Yes, sir.

Q. And you bought them with that knowledge?

A. Yes, sir--no, sir, he told me that after he got the snakes in the car.

Q. You went on up to his house with him?

A. Not Saturday night, no, sir.

Q. Was he at the house Saturday night?

Mr. James: You bet he was.

Mr. Hope: I certainly wasn't. I was with my wife.

Q. Mr. James further says, Mr. Hope, that you represented to Mrs. James that you were a medical student and were to perform an abortion on her.

Mr. Hope: I never talked to Mrs. James.

Q. Did you know Mrs. James?

A. Only just one time that I had breakfast with them at their home and seeing her once at the shop and once on this other Sunday.

Q. Was she at home at the time you spent out there re-[fol. 1755] pairing chicken houses?

A. One day. His sister was there, and also his niece.

Mr. James: What day was that she was there?

A. That was on Sunday.

Mr. James: The Sunday she came back from Long Beach?

A. No, sir, before she went to Long Beach.

Mr. Griffen: Hope, you tell us this, how does it happen that you were introduced to Eva Murphy as a man with medical training?

A. Absolutely I don't know. He told that.

Q. No, he didn't. His sister Eva Murphy knows you as a medical man.

A. No. I have never represented myself as that.

Q. As a man who studied medicine?

A. Never.

Mr. Fitts: Mr. James further says that Sunday when he left the house at about 2 o'clock in the afternoon, that he

left you with his wife. That when he returned about 4:00 Sunday afternoon that you told her you had had her bitten by this snake and she was in bed, and that she had bled quite freely. You told him that later, that her leg had bled freely. Is that true, James?

Mr. James: That is exactly the truth.

Q. That Mr. James remained with her that night and you returned back to the James residence the next morning, around 5:30 or 6:00 in the morning.

[fol. 1756] Mr. James: Right.

Q. You told him you were going to finish the job that morning, that she was an inveterate cigarette smoker and had been drinking and that you were going to burn her body by burning the house down. Is that true?

Mr. Hope: No, sir. I left the James residence at 2:30 Saturday afternoon and didn't return until one Monday morning.

Q. You did return Monday morning?

A. Yes, at one o'clock, not five.

Mr. Plummer: Whose car did you drive?

A. Mr. James' car.

Q. Where did you drive it?

A. I took my wife up and returned the snakes to Joe's.

Mr. Fitts: James says that when he left that morning you were left alone with his wife.

A. I was never alone with her.

Q. That later, at one o'clock on Monday, August 5th, you met him at the shop and told him you had drowned her in the bath tub. Is that true?

A. No, sir, I was lunching with my wife on Virgil and later went to the laundry between the hours of 12:30 and 1:30.

Q. At any rate, you did accept \$100.00 for the third batch of snakes?

A. Yes, sir.

Q. And that was given to you up at Mr. James' house, is that true?

[fol. 1757] A. He paid me the hundred when I got the second batch of snakes.

Q. How much did he pay you on the third batch?

A. He just gave me the money to buy them, \$10.00 to buy them.

Q. Later on he paid you \$100.00 did he not?

A. After he received the insurance money.

Q. And you knew it was from the insurance money?

A. Yes.

Q. And you knew he collected the insurance money upon his murdered wife?

A. Yes, sir.

Q. And you received that money because of whatever participation and help you had given him in the murder of that wife?

A. Yes, I stated that before. On the Sunday, on the 4th, Mr. James never left the house to my knowledge because I had his car and had gone with it and did not return until one o'clock in the morning. The car was seen by numerous people.

Q. Mr. James, did you take those snakes back to Joe's on Sunday?

A. (Mr. James) No, he took them back.

Q. At what time?

A. He left there with them about four o'clock.

Mr. Plummer: Was he alone or was his wife with him?

A. He told me his wife was waiting on the corner in the [fol. 1758] car.

Mr. Fitts: Did he leave you alone with your wife then?

A. Yes.

Q. What was her condition then?

A. She seemed to be—I thought she was intoxicated.

Q. You say Mr. Hope did the actual killing?

A. Absolutely.

Q. And Mr. Hope, you say that Mr. James did the actual killing?

Mr. Hope: Yes, sir.

Q. At any rate, you say that you both agreed to do the job for the purpose of collecting the insurance, the life insurance of \$10,000.00?

A. No, sir, when he mentioned the insurance he said it was \$5,000.00."

Mr. Williams: Is that the complete statement?

A. Yes, sir.

Q. Everything that was said by anybody in your presence?

A. Yes.

Mr. Parsons: May I see your notes, please?

Mr. Williams: Just a minute; may I look at the transcript?

By Mr. Parsons:

Q. Now, the conversation started 1:55 P. M. is that right?

A. Yes, sir.

Mr. Williams: I notice that on page 10, one place you wrote \$600.00 where it should be \$6.00?

[fol. 1759] A. Yes. \$6.00.

Cross-examination.

By Mr. Parsons:

Q. Now, your notes extend from page 8, through to where?

A. To page 68, I believe.

Q. And at what hour was the taking of the statement concluded?

A. They brought Mr. Hope in at 2:50 and it was shortly after that.

Q. Half an hour or so?

A. Yes, half an hour or so.

Q. Now, your notes run through to what page, you say?

A. 68.

Q. And from these notes you have described the statement which you read?

A. That is right.

Q. I notice here on page 17, where you crossed out some of your notes at that time, was that a mistake?

A. No, that was not a mistake. It was in connection with "I thought it was ridiculous. In fact, he wanted me to get one of my chickens and try it on it. He was drinking, and I didn't pay any attention."

Q. And why did you cross through here?

A. I don't remember why.

By the Court:

Q. Is that included in the typed statement that you wrote?

A. Yes.

[fol. 1760] By Mr. Parsons:

Q. On page 23, in a few instances were those places where you crossed through shorthand notes, do they represent figures?

A. They represent notes.

Q. What did they say, practically?

A. "I laughed and threw the damned spiders out."

Q. Have you written over your original notes?

A. No, I have not, but "He came over there to the shop and I said, 'Hope, you are nuts.'"

The Court: Miss Adams, you are accustomed to run a line through on something that you change?

A. Yes.

Q. Is that your explanation?

A. No, I don't know why I crossed it out.

By Mr. Parsons:

Q. The usual custom of stenographers is to run a line through, but here appears to be a place that you had written over the top of your original notes. I am questioning you, because I naturally wanted to observe those things. Out here on the side, you have a mark there.

A. Mr. Fitts did that.

Q. On page 30 have you crossed these things out and re-written?

A. That was when Mr. Fitts said, "Cross it out" and he started the question another way.

Q. In another fashion he said, "Withdraw that"?

A. He said, "What did he say he had done?"

[fol. 1761] Q. I notice at the bottom of page 50 some crossed out notes, was that withdrawn from the statement? Was that the question or the answer?

A. "He never let me know where he got any snakes. I did know he got the last ones from Joe in Pasadena."

Q. Where did he get them?

A. In Pasadena.

[fol. 1762] Q. Was the portion on page 64 that appears to have had a pencil run through it, was that in your transcription?

A. "At any rate you say you both agreed—" That was crossed out. He said, "At any rate, did you say, Mr. James—" and he may have said, "Cross that out," and I did cross it out. It makes sense later "That you both agreed to do the job for the purpose of collecting the insurance of \$10,000.00."

Q. What was the answer?

A. "No, sir, when he mentioned the insurance he said it was \$5,000.00."

Q. And now who were present at the beginning of the taking of this statement?

A. Mr. Fitts, Mr. Griffen, Mr. Stewart, Mr. Plummer, Mr. Southard, Deputy Sheriffs Killion and Gray, Everett Davis in our office, Mr. James and myself.

Q. Were there any other persons added to the party during the course of the taking thereof?

A. No.

Q. And had you been in and out of the office of the District Attorney during the early part of the evening?

A. Yes, I had been since about 2 o'clock Saturday afternoon.

Q. You had been there waiting since 2 o'clock Saturday afternoon?

A. I had been doing some other work. I had been taking statements from other witnesses in the case.

[fol. 1763] Q. Were you doing that in the early part of the evening?

A. Yes, sir.

Q. Then, at about the hour of 1:50 you commenced with this statement, is that true?

A. Yes.

Mr. Parsons: That is all.

Redirect examination.

By Mr. Williams:

Q. When you said that there wasn't anybody else added to that group during the time the statement was being taken, did you overlook the fact that Mr. Hope had been brought in?

A. Yes, I did. Mr. Hope was brought in.

Mr. Williams: That is all.

Recross-examination.

By Mr. Parsons:

Q. Miss Adams, from time to time, is it not a fact that there were other persons not attached to the District Attorney's office, newspaper reporters and other persons who looked into the room?

A. I believe some newspaper reporters came to the door, but they didn't come inside the door.

Q. From time to time they opened the door and looked in, didn't they?

A. They were at my back. My back was toward the door. [fols. 1764-1766] Q. Did you observe any of those persons at all?

A. Once when Mr. Fitts told them to leave.

Q. And from time to time as Mr. Fitts and the others were talking with the defendant, were the officers referring to notes or memorandum which they held in their hand?

A. I was busy writing. I didn't pay any attention to what they were doing.

Q. I understand that, but did you observe it at any time?

A. No, I did not.

Q. Did you observe when any of the officers, any of the persons in the room connected with the case, did at any time refer to any notes or memorandum?

A. I don't recall if they did.

Q. If they did you don't recall it?

A. If they did, I didn't see it.

Q. Now, were from time to time remarks made to the defendant as to what Mr. Hope had said upon a certain subject or a certain point in the discussion?

A. What my notes say is what was said.

Q. Only what your notes state?

A. That is right.

Mr. Parsons: That is all.

Mr. Williams: That is all.

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[fol. 1767] CHARLES H. HOPE, recalled as a witness in behalf of the People, having been heretofore duly sworn, testified as follows:

Cross-examination.

By Mr. Clark:

Q. Mr. Hope, referring to the occasion—it may be possible that there will be some slight repetition, simply for the purpose of preserving continuity of thought. Upon the occasion that you saw Mrs. James, as you say, tied to the table was she lying stretched out on the table or was she in a sitting position?

A. No sir, she was not in a sitting position.

Q. She was lying stretched out flat upon the table, is [fol. 1768] that it?

A. Yes, sir.

Q. Was she lying upon her back, her face or her side?

A. I would say her back.

Q. You used an expression “I would say her back.” Is there a doubt in your mind as to how she was lying then?

A. No sir, there is not.

Q. And at that time, as I understand your testimony you had a box with some rattlesnakes in it, is that correct?

A. One snake.

Q. One snake. Was that box placed upon the table beside her?

A. No, sir.

Mr. Barnes: We submit, if the Court please, that that has been fully covered by cross examination from page 322 and particularly 323 to 345.

The Court: That latter question was covered on page 323. However, it may be rather difficult to conduct——

Mr. Clark: It is difficult, your Honor.

The Court: (Continuing)—the examination without in a measure repeating. Overruled.

Mr. Clark: What was the rule?

The Court: The objection is overruled.

Mr. Clark: What was the answer?

A. The box was not placed on the table at her side, no.

Q. Where was it placed?

[fol. 1769] Mr. Barnes: That has been answered before, if the Court please.

The Court: You may answer it.

A. It was placed on the breakfast nook seat.

By Mr. Clark:

Q. Where was the breakfast nook seat located, that is, how far was the breakfast seat located from the table on which she was lying?

A. I couldn't say exactly on that.

Q. Approximately.

A. It could not have been much over a foot.

Q. Was the breakfast seat as high as the table?

A. No, sir.

Q. And were her feet the portion of her body that was closest to the breakfast table?

A. I don't understand that question, Mr. Clark.

Q. Well, what I am trying to get at is this: The breakfast seat had the snakes on it. Now, I am trying to find out whether the snakes were closer to her feet than any other part of her body.

A. Yes, sir. You said that table.

Q. Pardon me. I meant seat. And around what part of her body or limbs did the rope pass with which she was tied?

A. I couldn't state as to that. I noticed it on her hands is all.

Q. You remember do you, whether or not her legs were tied, or were they so she could move them about?

[fol. 1770] A. They were so she could move them.

Q. Her feet were not tied together?

A. She was not tied up, I would say, up to her shoulders an-way.

[fol. 1771] Q. Would you say that any rope was passed over her body or shoulders, and then under the table, so as to fasten her body down to the table?

A. Well, that was what I thought. I wasn't in there long enough to go into that.

Q. You mean to say now you didn't know whether she was tied in that manner?

A. I do know that she was tied in that manner, but you asked me how it was tied around the table, and I don't know.

Q. Now, the table, itself, was just a small table, was it not, three or four feet long?

A. Yes, sir.

Q. How would you say it compared with the size of the table that the reporter is writing on now?

A. I think it was longer than that.

Q. Would you say about two feet longer than that?

A. I don't recall the length of it.

Q. At any rate, the table was long enough that as she lay there on her back her feet rested on some part of the table, is that correct?

A. No, sir, her legs—at least, the knees were free.

Q. Then was she holding her legs out straight with her body, or did they droop over the edge of the table, as if one were sitting there?

A. They drooped over the edge of the table.

Q. Now, as they drooped over the edge of the table, that [fol. 1772] brought her feet how close to the top of the box containing the rattlesnakes?

A. I don't know that.

Q. Well, the box, as I understand it, had a lid, when it was taken and set down there, is that right?

A. Yes, sir.

Q. Was that lid removed?

A. No, sir.

Mr. Barnes: That has been answered before, your Honor.

The Court: Practically all of these matters have been answered before.

Mr. Clark: Yes, your Honor. This one in regard to the table, her head was up here. It may mean something to counsel.

Mr. Barnes: When the witness was being cross examined in connection with the black board, this witness was examined on that. I should have said "Exhibit 1".

Mr. Clark: Well, it is utterly impossible to make this intelligible without some repetition.

The Court: Well, I am ruling with you, Mr. Clark.

By Mr. Clark:

Q. Now, let me direct your attention, Mr. Hope, to an answer you gave heretofore. This at the top of Page 331, Mr. Barnes: "Mr. James had preceded me, and picked the lady's foot up, and pointed to this seat here in this breakfast nook. As the box was set down there, he stuck this foot in the box." I am now asking you if you were present [fol. 1773] when Mr. James put her foot in the box?

A. Her left leg.

Q. Whereabouts did he *seize* hold of her left leg?

A. I would say about the calf.

Q. Did he take hold of the calf of her left leg with one hand, or both?

A. I don't know.

Q. Would you say that that was about eight inches above the heel?

A. I wouldn't be able to answer that.

Q. When he took hold of her leg in that manner, were you looking in the box?

A. Yes, sir.

Q. Was the rattlesnake coiled?

A. Yes, sir.

Q. Was it rattling?

A. I didn't hear it.

Q. You were within a few feet of it at that time, were you not?

A. Yes, sir.

Q. Now, having taken hold of the left leg near the calf, as I understand, he threw the leg into the box, is that right? Did he put the foot into the box?

A. The foot, yes.

Q. As he did that the foot was descending into the box in a perpendicular manner, wasn't it?

[fol. 1774] Mr. Williams: That is objected to as being uncertain in any event, because the particular portion of it, what is meant by perpendicular, doesn't mean anything.

The Court: The question is somewhat ambiguous.

Mr. Clark: Well, will you just tell us then—as I understand, the foot was not put flat into the box, with the sole of the foot down?

A. I wasn't watching that.

Q. You didn't watch that?

A. No, sir, I was watching the snake.

Q. And as you watched the snake you saw the snake strike is that right?

A. I saw the snake strike, yes, sir.

Q. And when you saw the snake strike you saw where the foot of Mrs. James was, didn't you?

A. Yes, sir.

Q. Where was the foot of Mrs. James when the snake struck?

A. In the box.

Q. What was the position of the foot with regard to its sole, in relation to the head of the snake?

A. It was above.

Q. The sole of the foot was above the snake?

A. As I remember it, yes, or on a line with it. I wouldn't know whether it was on a line with it, or slightly above it. I would say it was slightly above it.

Q. And you saw the rattlesnake strike upward, and strike [fol. 1775] that foot, did you?

A. He struck out.

Q. He struck out?

A. Yes.

Q. Well, was the foot directly above the head of the snake?

A. No.

Q. If we were to bring you a box of the same dimensions as that box was, could you show this jury the position which that foot was in at the time you saw the rattlesnake strike it?

A. I don't know whether I could or not; I could try.

Q. About how much higher was the table than the breakfast seat?

A. I don't know, Mr. Clark.

Q. Well, it was higher, wasn't it?

A. Yes, sir, it was just like any other breakfast nook, as far as I know.

Q. As I get the idea, the seat was so arranged that a person could sit upon it to use the table?

A. That is correct.

Q. That would mean that the breakfast seat was about one foot lower than the table, wouldn't it?

A. I wouldn't state the height of it; I don't know.

Q. Now, when the rattlesnake was coiled up, its head was only about three or four inches above the bottom of [fol. 1776] the box, isn't that true?

A. I don't know about that, either.

Q. When Mr. James thrust the foot into the box, did he thrust it deeply enough into the box that his hand went in, also?

A. I don't know. I told you I wasn't watching him or her, either.

Q. When the foot was thrust into the box, was the table tilted toward the box?

A. Not that I know of.

Q. Did Mrs. James struggle or move when the foot was being thrust into the box?

A. Not to my knowledge.

Q. Now, I am going to read another portion of your testimony, so you will understand what I am trying to get at.

Mr. Williams: What page?

Mr. Clark: 332, Line 5: "And then the foot was immediately pulled out, was it? A. It was, yes, sir. Q. Was it done something like this, placed in the box like that, and pulled out? A. Yes, sir. Q. Just about as I have described? A. No, sir, faster than that. Q. Just like that? A. Just like that, yes, sir."

Q. Now, by those answers you meant to indicate that the foot was in the box only an exceedingly short period of time, didn't you?

A. Yes, sir.

[fol. 1777] Q. Then it was moved in and out with almost lightening like rapidity?

A. Well, not quite that fast, please.

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[fol. 1778] Redirect examination.

By Mr. Williams:

Q. Mr. Hope, did you tell the occurrence about this rattle-snake bite, and the fish pond occurrence, to anybody before you were placed under arrest?

Mr. Clark: Just a moment. That is objected to on the ground that it is immaterial, irrelevant and may call for hearsay testimony.

Mr. Williams: There is just a question in my mind as to whether the character of the cross examination has been such as to bring us within the recent fabrication rule. I am not at all insistent, because I don't know whether it has or not.

The Court: I think I will sustain the objection.

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[fol. 1779] WILLARD L. KILLION, recalled as a witness in behalf of the People, having been heretofore duly sworn, testified as follows:

Cross-examination.

By Mr. Clark:

Q. Mr. Killion, referring to this day when you took Mr. James out and had the conversation with him while he was eating dinner, I think that was the 2nd of May?

A. Yes, sir. And into the 3rd of May.

Q. And running into the early hours of the morning?

A. Yes, sir.

Q. Now, when you took Mr. James up to La Canada, you were talking with him—by “you”, I mean you or Mr. Gray were talking with him on the way up there, were you not?

A. Yes, there must have been some conversation.

Q. And do you remember what any of that conversation was?

A. I remember that we talked something about having something to eat and we decided that we didn't have time to stop for that. As I recall it we didn't have any conversation about the death of Mrs. James on that ride.

Q. That was what I was trying to get at. Now, you did get to 1329 Verdugo Road, I believe you stated heretofore. When you got there did you take Mr. James any place about the premises?

A. Yes, sir.

Q. Where did you take him?

[fol. 1780] A. To the back part of the premises near the garage and to the side of the fish pond.

Q. Did you have any conversation with him there at the fish pond?

A. As I recall it, the conversation had with him there was in asking him at what point on the edge of the pond—no, I am mistaken in that. It was Hope that was asked that question. I don't believe any conversation was had with Mr. James at the fish pond about it.

Q. You just took him out to where *the* could see the fish pond and came away, is that correct?

A. I do not wish to say no more conversation than that was held. Mr. Williams was there and many newspaper men and I do not wish to say that no conversation was held with him, but I do not remember any of the words that he said or that was said to him.

Q. Do you remember the substance of anything that was said to him there?

A. No, I don't recall of any conversation with him there.

Q. Now, do you recall any conversation with him on the way back?

A. About the same that was mentioned going to that place.

Q. There was no conversation in regard to the death of his wife or his making any statement concerning it?

A. As I recall it there was no conversation about the death of Mrs. James.

[fol. 1781] Q. Was he informed at any time on the way up, where he was being taken?

A. He was told that before we started from this building.

Q. Well, when you told him that, did you tell him why you were taking him up there?

A. No.

Q. And did you tell him why he was there while he was on the premises?

A. No, sir.

Q. And did you tell him why he had been taken there when he was on his way back?

A. I don't remember that.

Q. Did anyone—when I say "you", I mean it in the plural sense.

A. Not that I remember.

Q. Now, if you will oblige me by looking at the diagram here? I believe this is People's Exhibit 2. Do you recognize that as the premises there?

A. I do.

Q. And you recognize this walk around to the garage?

A. Yes, sir.

Q. And then you know the fringe of the walk that leads off in a westerly direction to a property line?

A. Yes, sir.

Q. And when you went out there, you went in back on the walk to the garage I have described?

[fol. 1782] A. That is true.

Q. And when you were going down there, you looked over toward the little pond, didn't you, to see what you could see?

Mr. Williams: That is objected to because in the former question he used the word "there"—

The Court: Reframe the question, Mr. Clark.

By Mr. Clark:

Q. While you were at the premises at 1329 Verdugo Road, it is true, as you walked back along the driveway, toward the garage, that you looked over toward the lily pond, did you not?

A. I don't know. I mean I do not know whether, when I was walking toward the garage, I looked towards the little pond. I went to the lily pond while I was on the premises.

Q. Did you make any observation while you were walking for the purpose of seeing whether or not the pond was visible?

A. I did that many times. On that occasion I don't remember whether I looked towards the lily pond or not.

Q. As a matter of fact, you could see that lily pond, particularly the south westerly portion of it, from many places along the walk there, couldn't you?

A. No.

Mr. Williams: Just a moment; I want to know what walk you are talking about. I object to the answer as uncertain.

The Court: In view of the answer, I am going to allow it.

Mr. Clark: I will make it so that even Mr. Williams will [fol. 1783] be satisfied. Directing your attention to the walk which leads down to the right of the house——

The Court: I think you might indicate that as the driveway.

By Mr. Clark:

Q. Yes, the driveway to the garage, you did observe that from that driveway you could look across and see the south-westerly portion of the pond, didn't you?

A. From a point on that driveway or by just saying the driveway, it wouldn't be true, because there are many places on the driveway that you cannot see the fish pond.

Q. The portions where you can——

A. The portions near the back part of the house, which would be this place——

Q. You are referring now to a point nearer the house——go ahead.

A. I would say within five or six feet north of the corner of the house, and looking down this walk, and you are able to see the northern end of the fish pond.

Q. And then, as you looked northerly along the direction line, more of the fish pond becomes in view?

A. No, that isn't true because of the shrubbery. As you walk north it is difficult to see the fish pond because of the shrubbery that is around this stone table and what shrubbery is north of the fish pond.

Q. Now, it is also true, is it not, that as you turn toward the west, at about a point indicated by a turn in a blue line that has been drawn on the diagram, until you get to a point [fol. 1784] opposite the center of the walk leading to the north of the premises, all along that area, you can see various parts of the fish pond, cannot you?

A. That is true.

Q. And as you go down the walk, which leads to the northerly part of the premises for quite a little distance along there—I may not mean quite a little distance, but 10 or 15 feet, you can look over and see the fish pond, cannot you?

A. I believe that is true.

Q. And when you go along the walk at the westerly edge of the premises, you can look through the shrubbery and see the fish pond at almost any point?

A. You might be able to see some portion of it through the shrubbery.

Q. Now, Mr. Killion, you remained with the defendant after he was taken to the District Attorney's office, during all the time until he went out to eat?

A. On my second trip, you are still talking about?

Q. Yes.

A. Well, I remained in one or the other of the two rooms. I wasn't with him every minute of those hours I spent there, but the greater portion of the time I was with him.

Q. At any rate, you accompanied him up to the room where he was in the District Attorney's office?

A. Yes sir, I did.

Q. And after getting there you remained there with him [fol. 1785] for some considerable period of time before you went out?

A. That is true.

Q. And during that interval of time, before you left that room, there were other people in the room also?

A. Yes, sir.

Q. And they were not just sitting there saying nothing?

A. No, sir.

Q. They were talking to Mr. James, weren't they?

A. Yes, sir.

Q. Now, you go ahead and tell us everything that was said to Mr. James up to the time that you first left the room?

A. Well, I will be unable to say which person said a certain thing, but, of course, I can remember about what was said in substance by some one of us.

Q. All right; just go ahead and tell us what your recollection is.

A. Well, he had been told that Mr. Hope had told the story of Mr. James' wife's death, and he was asked if he didn't want to tell his side of the story——

Q. Now, just a moment, before you go ahead. When he was asked if he didn't want to tell his story, his side of the story, wasn't it said to him in effect, that since they heard Mr. Hope's story, it would be better for them to hear his side of it too?

A. I am quite sure nothing like that was said.

Q. Well, he was told that if he told his side of the story [fol. 1786] at that time that they could better check on Mr. Hope's story?

A. I am positive nothing like that was said.

Q. Now, I don't want to weary you with a large number of questions. Was anything said to him at all as to what the effect of telling his side of the story would be?

A. No, sir. He was asked to tell his side of the story.

Q. Who asked him, if you remember?

A. I suspect all of us did at different times during this conversation.

Q. When he was asked to tell his side of the story the first time, what did he say?

A. I think he said that "That guy", referring to Hope, "is a damn liar and if you are going for that business", or words to that effect, "you will have to do it." As I recall, that was his reply.

Q. Did anyone reply to that?

A. Well, I can't remember as to that particular question. I mean I don't remember whether anyone replied to that particular thing or not.

Q. I wasn't there, of course, but didn't someone say, "Well, if Hope is a damn liar, you had better help us out by telling the truth"?

A. No, that isn't true, Mr. Clark.

Q. Did anyone say in effect, "Well, if Hope is a damn liar, the best thing for you is to tell us the truth, so we [fol. 1787] can investigate it"?

A. No, that is not true.

Q. Anything said to the effect that if he did tell the truth, that it would be investigated?

A. That it would be investigated?

Q. Yes.

A. I don't believe I understand what you mean.

Q. Was it said to him "Well, if you will tell your story now, we will investigate what you tell us"?

A. No, I don't remember that being said.

Q. Well then—of course, it is impossible for you to give the conversation in sequence, just as it occurred, but just go on and tell us what else you can remember that was said to him in that conversation.

A. Well, it was a long conversation. It was broken at intervals by some silence.

Q. Just a moment. When you say it was broken at intervals by some silence, do you mean that there were some times when Mr. James just quit answering questions?

A. No, I don't mean that at all. I mean, as you have intimated, that there was questioning for several hours, and during those several hours there were many times when nothing was said by James or by the other people who were present.

Q. All right. Now, let's have any of the other things that were said to him, if you remember.

A. Well, he was asked questions as to things about his [fol. 1788] wife's death. As I remember it, he might have been asked "Well, what did you do with the snakes? Where did you get the snakes and where did you go on a certain occasion?" and matters of that sort.

Q. Now, he denied gettin' any snakes, didn't he?

A. Yes, he did.

Q. And when he denied getting the snakes, some question after such denial, would be asked him as to what he did with them, wasn't there?

A. It might be possible that he was asked what he did with the snakes.

Q. His questioners kept on assuming that he got the snakes, during that entire time, didn't they?

A. Well, I don't know what the other questioners did.

Q. You heard them, didn't you?

A. Yes, but I don't know what they assumed.

Q. During that period was he asked anything about his wife's body being in the fish pond?

A. Yes, sir.

Q. What was he asked about that?

A. I can't tell you, in words.

Q. Well, give me the substance, as nearly as you can.

A. He was asked when the body was put in the fish pond and by whom.

Q. He told you he didn't know, didn't he?

A. Well, in substance, yes.

[fol. 1789] Q. He wasn't there?

A. That is what he said.

Q. And when he said that did anyone tell him that he was a liar?

A. No, sir.

Q. Did anyone tell him that they had the goods on him?

A. No, sir.

Q. Then what were some of the other things that were asked him?

A. Well, if this is a satisfactory answer, about everything that is in Hope's story was asked him.

Q. And he denied every bit of it, didn't he?

A. No, I wouldn't say every bit.

Q. What do you remember that he didn't deny first?

A. Well, he admitted that he knew Hope and that Hope had been up there and he said that Hope was a medical student and that Hope had used his automobile on different occasions. Those were some of the things that I remember that he didn't deny.

Q. But he did deny having discussed killing his wife with Hope, didn't he?

A. Yes, he did.

Q. He denied being in any way concerned with his wife's death, didn't he?

A. Yes.

Q. He denied all knowledge of her being dead until her [fol. 1790] body was found in the fish pond, didn't he?

A. Well, I don't know that that was asked him. In substance, I suppose he did.

[fol. 1791] Q. He denied having any wish to see his wife's death, didn't he?

A. I suppose in thought, at least, he did. I don't know that that was asked him.

Q. He stated that he loved his wife, didn't he?

A. I don't think he did on that occasion, no.

Q. Well, now, the answer that you gave a moment ago, when he was asked nearly everything concerning the matter, covers the whole conversation up to about the time that he went out to dinner?

A. As I remember it, it does.

Q. What was said to him just before he said that he would make a statement?

A. He called to me. At that particular time there was no one in the room except Mr. Gray, Mr. Hope and myself.

Q. Mr. Hope do you mean?

A. Mr. James, Mr. Gray and myself. The three of us were the only people in the room. Mr. James said, "Say, can't we go out and get something to eat, and I will tell you the story?"

Q. Now, it had been prearranged that you and Mr. Gray would be left alone in that room with Mr. James, hadn't it?

A. No, I am sure it had not.

Q. If it had, you had no knowledge of it?

A. That is right.

Q. How long continuously had you been in that room with [fol. 1792] Mr. James before Mr. James said this?

A. Do you mean alone?

Q. Yes.

A. A very short time; a few minutes, I would say.

Q. Both you and Mr. Hope had been out of the room for some time?

A. You mean Mr. Gray?

Q. You and Mr. Gray, I mean. That evens things up. You corrected my mistake one time, and I corrected yours another.

A. Thank you.

Q. You and Mr. Gray had been out of the room for some interval of time, and both came back just before he said this?

A. No, that isn't true. We had been in the room for some time, but the other persons who had been in the room with us had departed.

Q. How long would you say you and Mr. Gray and Mr. James were in the room there alone before he said this?

A. I would say five or ten minutes.

Mr. Clark: I hope your Honor will indulge me this one purpose:

Q. Will you tell me once more, and just as nearly as you can remember in the words used by Mr. James, what it was that he said in regard to making a statement? I don't want to suggest or intimate anything in my question. I want it to come from you as nearly as you can reproduce the words. [fol. 1793] A. In substance—I can't remember the words, but in substance he said, "Can't we go out and get something to eat?"

Q. Is that all?

A. Just a moment.

Q. Pardon me. I didn't mean to interrupt you.

A. Or to the effect that, "If you fellows—" and I got it from that that he meant Mr. Gray and me—"—will take me out to eat now," he said, "I will tell you the story."

Mr. Clark: That is all.

Mr. Williams: Did he make that suggestion himself?

A. He did.

Q. You didn't tell him—

Mr. Clark: Pardon me; just one further question:

Q. When he said that you said you would take him out, didn't you?

A. I said, in reply to that, "Why, sure, I think we can go out and get something to eat."

Q. And then you took him out?

A. After a short time, yes.

Mr. Clark: That is all.

Redirect examination.

By Mr. Williams:

Q. Mr. Killion, all of this that you have been telling in [fol. 1794] response to Mr. Clark's questions are things that happened prior to the defendant making the statement concerning which you testified last Friday?

A. Yes, sir.

Q. And the statement that he made, concerning which you testified last Friday, was the one that he made after you and he and Gray and Davis and the young lady that was with you had your dinner?

A. That is right.

Mr. Williams: That is all.

Recross examination.

By Mr. Clark:

Q. My attention has just been called to something that I overlooked. When I make that statement, your Honor, I don't mean that my attention has been called to any fact that I overlooked, but to some interrogation that I should have made. Some reference was made as to public opinion, while Mr. James was waiting up there, wasn't there?

A. I don't know what you mean, or where you mean.

Q. I mean while Mr. James was up in the District Attorney's office, before he made any statement, wasn't it said to him that public opinion was much aroused, and he had better look out; the kind of stories that he was telling weren't doing him any good?

A. No, sir.

[fol. 1795] Q. Was any part of that said?

A. Not in my presence.

Q. Was any reference made to Public opinion at all?

A. No, sir.

Q. Or anything said to him to the effect that what he had been telling wouldn't do him any good?

A. Nothing like that was said while I was there.

Q. Was any reference made to mob violence?

A. Not in my presence.

Q. Or was he told that he might need protection against the public?

A. No, sir.

Mr. Clark: That is all.

Mr. Williams: That is all, Mr. Killion. Call Sam Grant.

SAM GRANT, recalled as a witness in behalf of the People, having been previously sworn, testified as follows:

Direct examination.

By Mr. Williams:

Q. Mr. Grant, were you in the barber shop at 822 West 5th Street, of which James was the owner, on Monday morn-

ing, the day upon which Mary James' body was discovered in the fish pond?

A. Yes, sir, but you have the address wrong. It is 522 West 8th Street.

[fols. 1796-1863] Q. Did I say "822"? I always get all the numbers in, but get them mixed up someplace. What portion of that day were you in the barber shop?

A. I was in all day, with the exception of when I was out to lunch, and I don't recall if I was out for any errand, or not.

Q. Do you remember the time when Mr. James went to lunch on that day?

A. Yes, sir.

Q. About how long was he out to lunch?

A. I would judge about half an hour, approximately half an hour.

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[fol. 1864]

MOTION TO STRIKE

Mr. Clark: I also move to strike out all of the testimony of Grace Yarnell which begins upon page 808 and ends upon page 824, and also her subsequent testimony which begins upon page 1061 and ends upon page 1063; for the same reasons, that the evidence is irrelevant and incompetent.

The Court: Without pausing to rule on that, Mr. Clark, just run right through the other Colorado testimony and then I will rule upon them in a group, unless you want a ruling upon each one separately.

Mr. Clark: I also move to strike out all the testimony of Gerald Rogers, which begins on page 824 and ends on page 862, the testimony of Dr. George B. Gilmore, which begins upon page 864 and ends upon page 888, the testimony of Alva E. Custer which begins upon page 890 and ends on page 901, the testimony of Mrs. Irene Snyder which begins upon page 902 and ends upon page 911, the testimony of G. B. Dunnington, which begins on page 911 and ends on page 922, the testimony of Mr. John A. McKelvey, which begins upon page 922 and ends upon page 926, the testimony of Mr. C. A. Pries which begins upon page 927 and ends upon page 967, the testimony of Mr. Bayard Judd, which begins upon page 981 and ends upon page 990.

The Court: May I just inquire who Bayard Judd was?
[fol. 1865] Mr. Parsons: The Kansas City Life Insurance Company representative.

The Court: Oh yes, I have it.

Mr. Clark: The testimony of Doctor Charles Decker, which begins upon page 1297 and ends upon page 1341. I haven't included in the present motion his testimony when he was recalled. That is all I think in that group.

The Court: These motions taken separately and considered severally each and every one of them is denied.

Mr. Clark: Now, I move to strike out, upon the same ground, namely, that they are incompetent, irrelevant and immaterial, all of the exhibits beginning with Exhibit No. 39 and ending with Exhibit No. 61, produced by the People, on the ground that they are incompetent, irrelevant and immaterial.

Mr. Barnes: That would not include 50 and 51, would it?

The Court: They are not in.

Mr. Clark: I have 50 and 51 marked as having something to say in regard to them.

The Court: They are for identification only. Treating the motion as being made separately and severally as to each one of the exhibits as though they were taken up individually, each one of those motions will be denied.

Now, I was under the impression, Mr. Clark, that there was another exhibit in here somewhere—did you include Exhibits 71 and 72?

Mr. Clark: No, your Honor, I did not.

[fol. 1866] The Court. I will assume that you have made motions as to those exhibits also.

Mr. Clark: Thank you.

The Court: And those motions are also denied. Those refer to the Kansas City Mutual Life Insurance Policy. I think the record is protected with reference to the Colorado transaction.

Mr. Barnes: Have you finished?

Mr. Clark: No, there is one other motion, but I didn't have time this afternoon to locate it in the transcript.

The Court: I wonder if we might not bring the jury down and excuse them for today?

(Discussion at counsel table.)

Mr. Barnes: That was the testimony of the witness, Hughes. That testimony was read by myself in the place

and stead of Mr. Hughes. It may be agreed that it was the testimony of Mr. Arthur Hughes, the court reporter?

Mr. Clark: I move to strike out all of the testimony of Arthur Hughes, as read from his shorthand notes, by Mr. Barnes, upon the grounds that it also is incompetent, irrelevant and immaterial.

The Court: Have we a reference to the pages?

Mr. Barnes: I can give you the page approximately. 556 to 591. I take it, however, there is no objection that the testimony was read by myself rather than the witness, Hughes?

Mr. Clark: There is no question about that. It is just the [fol. 1867] same as if Mr. Hughes had read it and testified to it at length.

* * * * *

Mr. Barnes: We have two more exhibits to offer. May we do that now before your Honor adjourns or would you prefer that we take it up in the morning.

The Court: You may do it now if you want to.

Mr. Barnes: That is Exhibit- 50 and 51. Exhibit 51 is the sketch drawn by Gerald Rogers and 50 being identified by the witness, Yarnell, as a letter written to the insurance company on behalf of the defendant, the original of which we promised counsel we would have and which we did show [fol. 1868] to them during the course of the examination. Exhibit 50 is the photostatic copy of it.

Mr. Clark: 50 is the letter?

Mr. Barnes: Yes.

Mr. Clark: As to that we object on the ground it is incompetent, irrelevant and immaterial. And as to 51, we object on the ground it is irrelevant and immaterial.

The Court: Both Exhibits will be received in evidence.

* * * * *

Mr. Clark: The motion to strike Mr. Hughes' testimony, I believe is now pending.

The Court: That motion will be denied.

Mr. Clark: I now move to strike out all of the testimony of the witness, Killion given subsequent to his voir dire examination, and particularly that portion of his testimony which relates to the alleged conversation between him and the defendant on the 2nd or 3rd of May at a

restaurant where the defendant was taken to eat, on the ground that it appears that the statements then made were not freely or voluntarily made but were the result of force, threats, duress, intimidation and inducements. [fol.1869] The Court: Have you finished, Mr. Clark?

Mr. Clark: Yes, your Honor.

The Court: The motion will be denied.

Mr. Clark: I now move to strike out all of the testimony of Dorothy Adams with relation to a conversation in which the defendant took part, upon the ground that no foundation was laid for the introduction of said testimony, by showing that the statements were free and voluntary, but that it now appears that the statements made by the defendant there were induced by force, threats, intimidation, duress and inducement.

The Court: Same ruling. Motion denied.

Mr. Clark: I guess I have moved to strike about everything, haven't I?

The Court: There is still a little you might operate on.

Mr. Barnes: I think there was one witness gave an address that you overlooked.

MOTION FOR DIRECTED VERDICT

Mr. Clark: I now move that the Court direct the jury to acquit the defendant upon the ground first, that the corpus delicti has not been established by other evidence than the statements and admissions of the defendant, secondly, upon the ground that the alleged confessions of the defendant made to Mr. Killion and at the District Attorney's office are exculpatory and insufficient to show the commission of a crime by him and that as to his alleged confession made to Mr. Hope that it is the testimony of an accomplice, a confession claimed to have been [fol.1870] made by an accomplice, uncorroborated by any testimony tending to connect the defendant with the commission of the offense.

The Court: That motion will be denied. The reason of the Court is that it is the opinion of the Court that the confessions are admissible, that the corpus delicti has been established, for the further reason that the motion for an advised verdict is premature, the defendant not having rested. However, may I say this: If the defendant had

rested, so that there will be no need for further presenting the matter, if the defendant at this time had rested and requested the Court to acquit, the Court would, at this time, deny such a motion made under those circumstances.

Mr. Clark: Thank you, your Honor. That will relieve me from the necessity of presenting the motion further.

Now, this had not been placed in legal form, but we on receiving information communicate it to your Honor. We are in receipt of information that warrants the belief on our part that by taking depositions in Colorado Springs, Colorado, we can contradict some of the facts deemed material here, testified to by the witnesses for the prosecution, and particularly that we can contradict the testimony of Mr. J. D. Rogers concerning the apparently intoxicated condition of Mrs. James, and we move for a reasonable continuance to give us an opportunity to take the deposition of the witness who has communicated with us and such [fol. 1871] other witnesses as we may find at Colorado Springs. In making this motion, if the Court deems it necessary to deny the motion by reason of a failure to support it by affidavit, we offer, either by affidavit of all testimony to prove the things that I have stated in regard to the communication we have received and what we can establish by that. That is all.

The Court: I think counsel will agree with the Court that the showing thus made is one which the Court would have to say as a matter of law is insufficient. Counsel also understands that this does not indicate any hesitancy on the part of the Court to accept any statement of counsel, but I think the showing should be made in the regular manner. In other words, the various elements of the grounds for a continuance should be shown by the evidence and the Court thus placed in the position so that if the showing for a continuance seemed sufficient to the Court that upon the Court granting it the record would show that and if the ground seemed insufficient and the Court denied the motion it would also be completely a matter of record.

Mr. Clark: Yes, your Honor, I think that all your Honor has said is perfectly true. Shall I put in all testimony?

The Court: If you want to run beyond the usual time, I am willing to run until 5 o'clock if you want to.

Mr. Clark: It will not be necessary to run that long, your Honor.

ROBERT S. JAMES, recalled on voir dire examination, and testified as follows:

[fol. 1872] By Mr. Clark:

Q. Mr. James, I hand you a letter and envelope, and ask you if they came into your possession during the course of this trial?

A. Yes.

Q. And directing your attention to the envelope and the post mark, "June 24th", when, with relation to that date, would you say that you did receive that?

A. I received it when I went to my tank one day last week.

Q. And at the time you received it was the letter in the envelope?

A. Yes, sir.

Q. Now, do you recognize the writer of the letter as any one you knew in Colorado?

- A. I remember the man at the top of the Peak that day. My wife and I visited him just before he left the top of the mountain.

Q. Did you remember his name before you received the letter?

A. I don't believe I would remember his name, unless he called my attention to it in the letter.

Q. And he called attention to it in the letter?

A. Yes, sir.

Q. And upon receiving the letter did you hand it to me as soon as you had an opportunity to do so?

A. I did.

[fol. 1873] Q. Now, do you recall any of the other people that you saw either at the Peak, or at the scene of the accident that occurred after you left there, who have not been here in court?

A. Do I recall any of them?

Q. Yes.

A. Well, right off hand I don't think I do.

Q. During the time that your wife was in the hospital, was she conscious?

Mr. Barnes: Just a minute. I object to it on the ground that this is a showing with respect to the matter about which we have just been talking.

Mr. Clark: Why, surely. The purpose is to show that prior to her death Mrs. James was conscious, and that he

had tried to get other names so that we might proceed to take their depositions, and prove by them that she never claimed that this defendant assaulted her. That is the purpose of the question.

Mr. Barnes: Well, we will submit that that is not a question about an injury.

The Court: I submit it is somewhat of an inquiry as to who is the writer of the letter.

Mr. Clark: Yes, Your Honor.

The Court: I hate to say what I am going to, because it may seem unnecessary, but I don't think there should be any doubt about it, but I think it should be in such form that [fol. 1874] it in effect was this, that the party if called as a witness would state thus and so, and stating what the witness would testify to——

Mr. Clark: Well, your Honor——

The Court: —and I expressed that in the showing of that it would be insufficient. So the mere showing that there were some people that talked to Mrs. James at the hospital, unless it was submitted to what those people might be called to testify to——

Mr. Clark: Your Honor, may I make the counter suggestion that it seems to me that the fact that she was conscious and talked to by people at the hospital, was a probable fact. What she said to them is hearsay, if we cannot prove it, but that she did talk to them, was conscious, was able to make charges against her husband, seems to me to be probable facts. That is why I proceeded this way. If, having suggested to your Honor what I have, your Honor is still of the opinion that you have just expressed, I shall bow in deference to your Honor's view.

The Court: You may proceed.

By Mr. Clark:

Q. Was Mrs. James conscious while she was at the hospital?

A. She was conscious the next morning at 7:00 o'clock.

Q. And she remained conscious until the time of her death?

A. She did.

Q. Do you know the names of the nurses who attended her?

[fol. 1875] A. No, I don't remember their names now.

Q. Do you know of any visitors that she had after the accident, either at the hospital or at the house?

A. Well, her father visited her.

Q. Where is he now, do you know?

A. He is in Fargo, North Dakota.

Q. Any one else?

A. Mrs. Yarnell and her two daughters visited there.

Q. That is the daughters that have testified here?

A. Her daughter. Her mother is in Colorado Springs.

Q. Do you remember any others?

A. Well, the Doctor that attended her was there every day.

Q. Who was the doctor?

A. Well, I heard his name the other day, but I don't remember his name now. If you told the name I would know.

Q. May I offer the letter and envelope?

The Court: Mark it Exhibit A on the motion.

Mr. Clark: I have nothing further to present, your Honor.

Mr. Williams: I have no questions.

A. Is that all?

[fol. 1876] The Court: Just one question, Mr. James: You referred to the daughters of Mrs. Yarnell. Was it one of the daughters that testified here?

A. That was one of the daughters.

Q. She was one of the daughters that visited your wife?

A. Yes, sir.

Mr. Barnes: We resist the motion, if the Court please, on the ground that there is no proper showing made, and all the evidence except that referred to in the letter, is merely cumulative, the witness Yarnell having testified in effect that the wife was conscious and nobody has suggested anything to the contrary, and as a matter of fact, there is no showing what the other witnesses may testify to.

The Court: May I see the letter?

Mr. Williams: Now, as far as the matters contained in the letter is concerned, it is a matter which may or may not have any significance. Even as indicated in the letter, it is indicated that the victim, Winona James, could have been drunk at the time of the accident. In addition to that, this matter was called to the attention of the defendant and

apparently it was brought to the attention of the Court in the middle of last week—

Mr. Barnes: July 9th.

Mr. Williams: —several days ago, and there has been no additional investigation made by the defendant, and there has not been any effort to secure a stipulation that the [fol. 1877] deposition might be taken back there. There isn't any specific showing as to what the witness would testify, except in general appearance. I do not think there is that showing of diligence by showing that the evidence is important or the requisite statement as to the showing as to what the witness would testify to, which is required by the law.

I certainly was prepared when counsel brought the matter up last week—counsel said to call it to the attention of the Court in my presence and I stipulate to the taking of a deposition at any time, and no such request was made, my thought at that time being that the deposition could be taken by the telegraphic expert and returned to this jury without the necessity of continuance.

This was known in the opening statement to the jury in this case. The defendant and his counsel knew that evidence touching the death of Winona James would be offered in court by the prosecution. At that time every opportunity was presented to him to make any investigation they desired, and to request either from the Court or from counsel as to whether a stipulation to the effect that the depositions might be taken. No one of those things were done.

It seems to me that it is my desire that this defendant should have every right which the law gives him, and I do not think we have the right to delay this trial at this late date and for the purpose suggested by the writer. For that reason we are opposed to the application.

[fol. 1878] Mr. Clark: If your Honor please, this defendant has not been shown in this case to be a—there is no reason for counsel for the prosecution taking that stand. He has brought into this court evidence of another offense which it is claimed took place more than four years ago, more than a thousand miles from the court room. Isn't the right of the defendant to have a trial by a jury of those in the county, which means in the community. That constitutional right exists by reason of the very great law that if justice be done, the defendant is entitled to bring his witnesses into the courtroom. It is true that counsel ad-

vised us of their intention to offer this evidence. It is also true that we were firmly convinced that the evidence could not be gotten under any conceivable set of facts, and being so convinced, we had *no* reason to anticipate that your Honor's views would differ from ours——

The Court: I don't think you are really right on that, Mr. Clark. If you wanted to do it you should have said, "We have the testimony and we want a continuance to get it."

[fol. 1879] Mr. Clark: Well, outside of the burden of a strenuous trial, where counsel have the reponsibility of a man's life upon their shoulders, they can do just one thing at one time. They have to concentrate on all the facts that are being produced. Among the three counsel who are representing the defendant here, we could not be expected to go to Colorado Springs. If we had the time and the money perhaps we could do that. Those things we have not, and we had no need for the deposition until we reached this stage of the case. I will take the broad position that where, as here, an attempt is made to prove the issues of another crime largely separated from the place of trial, and largely separated from the time of trial, that when that attempt is made then the defendant has a right to a reasonable continuance in order to get that evidence which he cannot reasonably get now, and which he should have. He doesn't know from the Indictment that he was going to have that evidence to get.

The Court: I think you are overlooking this fact, Mr. Clark, that when the opening statement was made the District Attorney declared what he was expecting to prove, and the objection was made, and the Court made a ruling that at least the possibilities were that that testimony would be received if offered. It seems to me that that was the time that the fact was presented, and the Court should have been informed of the fact that a continuance might be necessary.

Mr. Clark: If your Honor will remember, we restrained [fol. 1880] from answering at that time. We stated that the defendant was in court with his counsel. We have never answered for that reason.

The Court: I don't think that is the situation at all.

Mr. Clark: I think——

The Court: I think the law is too well settled, that if you want to take a deposition—well, I am not worrying about

that situation. If an effort was made to conduct the investigation to ascertain whether there was such information—I am satisfied that counsel made that effort—but we do not know that there is such a person, or the person who wrote the letter is the person that Mr. James wrote the letter to at all.

Mr. Clark: May I say this: We have received in this case a small number of crank letters, and an extraordinary number of letters tending to call our attention to suggestions. Most of them—they make a decided difference in the evidence that we are going to produce here. I think perhaps without going out of bounds to say that this defense, even though your Honor denies the motion, will be more responsive—

The Court: That may be true, but we are ruling on a question. I am satisfied there is no reason for the motion.

Mr. Clark: If any person wants a discussion, he must take his position, your Honor. He may not be late. The point that I make is that we had no notice that we wanted a continuance, by reason of counsel's opening statement, [fol. 1881] and not intending to reflect on your Honor, but I at least had no reason to believe for a moment that if we had a discussion at that time that we could get it. That is not the first opening statement, your Honor—if we asked for a continuance to get all the things that are said in the opening statement, your Honor knows that the administration of justice would be greatly delayed. Frankly, I don't think that we will put on a demand for a continuance, until your Honor denies the motions.

Now, we have reached our defense. Now, your Honor has ruled that all the facts before your Honor, as to the admissibility of this evidence—it was well decided during the course of the case that the Court can tell the necessary foundation will be laid.

[fols. 1882-1883] We believe that we have made our application properly and that it is sufficient. We have presented it therefore to the Court in good faith. If the Court thinks that we haven't made it promptly your Honor must deny it. We are willing to submit to whatever ruling your Honor thinks is proper.

The Court: "The motion for the continuance will be denied because of the insufficiency of the showing.

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[fol. 1884] JOE HOUTENBRINK, called as a witness in behalf of the defendant, having been heretofore fully sworn, testified as follows:

* * * * *

[fol. 1885] Mr. Clark: Will your Honor indulge us for a moment? Mr. Moore, are those two rattlesnakes here?

Mr. Williams: Do you want the rattlesnakes?

Mr. Clark: Yes.

Mr. Williams: They are down in the squad room.

Mr. Clark: Well, suppose we bring them here now. We won't have them in here longer than necessary and not to make any spectacular display.

Mr. Williams: We didn't know that you wanted them this morning.

Mr. Parsons: It is my fault. I should have told you last night.

Mr. Clark: Shall I proceed, your Honor, as best I can while the snakes are on the way?

The Court: If you can proceed without them, you might.

Mr. Clark: I think I can. I might find that I don't really need them at all. It is a matter of precaution that I am having them brought.

Direct examination.

By Mr. Clark:

Q. Mr. Houtenbrink, certain snakes were brought in to the courtroom here and received as an exhibit. Has your Honor the exhibit number?

The Court: I can get it in a moment here.

The Clerk: Exhibit 20.

Mr. Clark: Thank you.

[fol. 1886] The Court: 20 is right.

Mr. Clark: Received here as People's Exhibit No. 20. You saw those snakes of course, when they were here?

A. Yes, sir.

Q. You have been, as I recollect your testimony, dealing in reptiles, handling rattlesnakes, buying, selling and keeping them over a term of years?

A. That is right.

Q. And you have learned, have you not, as a result of that experience—that rattlesnakes do not ordinarily live long in captivity?

A. Oh, I should say not long, five to ten years.

Q. As a matter of fact, Mr. Houtenbrink, isn't it true that the average life of a rattlesnake in captivity is less than one year?

A. Well, that all depends on the party that is handling them.

Q. Isn't it true that the average length of life of the rattlesnake in captivity that you have handled doesn't exceed three months?

A. I should say at least two years.

Q. You are quite sure that the rattlesnakes that you sold Mr. Hope weren't dead when this trial commenced, are you?

A. No, sir. I say this is the snake that Mr. Hope bought.

Q. And those snakes came into your possession first when?

A. That would be hard to say because I didn't have any-
[fol. 1887] thing to check it up by, but let's say two months anyway.

[fol. 1888] Q. You mean two months before you sold them to Mr. Hope?

A. Certainly.

Q. Did you catch them yourself?

A. No.

Q. Where did you get them?

A. I would hate to say the names, because there are competitors of mine in this courtroom who would like to know the names of the persons I buy my snakes from.

Q. Unfortunately I believe that the answer is necessary. I shall be obliged to insist on the answer.

The Court: You may answer.

Q. All right. Mr. S. H. Walker, Indio, California, one of my collectors.

By Mr. Clark:

Q. And did you receive any bill of lading, or notice of express, with relation to the delivery of these snakes?

A. No, all you do is just sign when the shipment comes in, sign your bill, and pay your freight, and take out the snakes.

Q. Do you have now any bill of lading, or any other paper, relating to the purchase by you of these two snakes?

A. I don't just get two of them in a box.

Q. I mean the two that were brought here into the courtroom.

A. It would be very hard to say, because there might be 20 of them come in one shipment.

[fol. 1889] Q. As a matter of fact, do you know whether you did receive 20 in the same shipment that these came in?

A. No, certainly not; I couldn't say that.

Q. You have a distinct recollection of the shipment in which you received these snakes, haven't you?

A. Not necessarily, no.

Q. You say "not necessarily", but as a matter of fact, have you?

A. No. How could I?

Q. It is true, is it, that you don't know how many snakes you bought at the same time you bought these two?

A. No, unless I look over my records.

Q. Do you know whether you bought any others than these two at the time you bought these?

A. No, I maybe bought some more. I am very sure that I did, because it is very seldom that a shipment comes in with just two snakes. There is always 20 or 30 snakes in a shipment.

Q. Now, you have been buying snakes within the last few months, haven't you?

A. Yes.

Q. The snakes you have been buying in the last few months have included snakes of the same species as the two that are here in the courtroom, haven't they?

A. Certainly.

Q. They have included snakes of the same size as the two [fol. 1890] here in the courtroom, haven't they?

A. Well, yes.

Q. Now, do you buy rattlesnakes so much per snake, so much per pound, or how?

A. No, we buy them in pounds.

Q. And the market price of rattlesnakes last August was how much per pound?

Mr. Williams: Do you refer to the wholesale or the retail price?

Mr. Clark: I am referring to the price that he paid, that he and other dealers paid.

A. We pay as low as 25, and then also we pay 35.

Q. And sometimes you pay 75, don't you?

A. No, I never do pay 75.

Q. These are about 3-pound snakes, are they not?

A. There was a little bit over 6 pounds.

Q. For the two?

A. Yes, a little bit over.

Q. And the market price, the price that you were paying, at the time the snakes were sold to Mr. Hope, was 25 cents a pound?

A. Either 35 or 25.

Q. That was net to the man that sold the snakes to you?

A. Yes. And I paid the extra charges, and for the keeping of them.

Q. And the extra charges upon snakes is one and a half, [fol. 1891] or two times—

A. No, one and a half—

Q. One and a half is the highest classification for express from there. that is correct, isn't it?

A. Correct.

Q. You have no objection to my removing the sack, have you?

Mr. Williams: No.

By Mr. Clark:

Q. Have you been keeping these snakes in this same box ever since you brought them back from Mr. Hope?

A. No.

Q. Where have you kept them?

A. In a cabinet, something similar to it. They have a glass front, and the rest is all wood.

Q. And they were kept at your place of business?

A. Correct.

Q. And you were keeping a lot of other snakes at your place of business?

A. Not a large number, but—

Q. From that time down to the present—

A. If you want to know how I know this, that these are the snakes—

Q. I want you to answer my questions. Will you do that?

A. Yes, sir.

Mr. Williams: May I suggest that this witness has not been asked a question, although he is put on for direct examination.

[fol. 1892] Mr. Clark: I don't like counsel——

The Court: If Mr. Williams wants to object, he may object, and the Court will rule upon it. Otherwise, we will get along with the examination.

Mr. Clark: Will you please read the last question and answer.

(Record read by the reporter.)

By Mr. Clark:

Q. And you were keeping a large number of other snakes in the same place of business?

Mr. Barnes: That is objected to as leading.

The Court: Overruled; you may answer.

A. Not at that time, no.

By Mr. Clark:

Q. Well, between that time and the present you have had many snakes, haven't you?

A. Yes.

Q. Many of these snakes were snakes of this same breed?

A. Yes, certainly.

Q. And many of this size?

A. Not many of them, no.

Q. Now, did you put any identifying mark upon any box, or the place where you kept the two snakes that you sold Mr. Hope?

A. No, but I moved——

Q. No, but answer the question.

The Court: Just answer the questions; we will get along all right. Just answer the questions as direct as you can.

[fol. 1893] A. Sometimes, you know, I am explaining how I know it.

Mr. Clark: Well, Mr. Williams will bring it out on his examination.

The Court: Before we get through we will know it.

By Mr. Clark

Q. You did have snakes die during the last year, didn't you?

A. Yes, sir.

Q. And you had snakes of this species die, didn't you?

A. No.

Q. None of the snakes of this species?

A. None whatever.

Q. And the snakes you sold to Mr. Hope, and bought back, you have them?

A. Yes, sir.

Q. What are the things that the snakes have been fed?

A. The best thing is kangaroo rats and small Cottontail rabbits.

Q. And that is what you feed them?

A. Yes, sir.

Q. Those in the courtroom?

A. They haven't been fed since they have been put in the cage.

Q. Now, when, as near as you can fix the time, is the last time you did feed them?

A. Well, that would be hard to say, and it is something—you know, I was not expected to be called here to answer [fol. 1894] such a question.

Q. Your answer is, then, that about that part of it you are not able to answer that now?

A. Yes, that is it.

Q. You sometimes feed them milk, don't you?

A. Milk?

Q. Yes.

(Witness laughs.)

Q. Well, you have had a good laugh. Will you answer the question?

A. Never.

Q. Well, you are not the man, then—you didn't place the bottle of milk close to the snakes in the courtroom?

Mr. Barnes: I don't think that is material.

Mr. Clark: That is all.

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[fols. 1895-1903] FRANK WEINBERG, called as a witness in behalf of the Defendant, being first duly sworn, testified as follows:

Direct examination.

[fols. 1904-1906] Mr. Clark: Will you just describe the symptoms of a rattlesnake bite as you have observed those symptoms on yourself and others.

A. In the bite you get a sting like two red hot needles would go into you. That is the only pain you get. That pain stays there for maybe 10 or 15 minutes and then after that other complications set in.

[fol. 1907] Q. Now, you spoke about two punctures. How [fol. 1908] does that come about?

A. Well, a snake has two fangs, and the two fangs go in the flesh.

Q. Now, what are rattlesnakes' habits in regard to striking? Does the snake strike from being stretched out his full length, or how?

A. The snake has to get what we call a foot-hold, the same as if you would see a prize-fighter, if you hang him up in the air, he couldn't punch you. He has to have a foot-hold, so when a snake coils, one-third of the length does all the striking. Once in a while when a big snake is angry, it might strike one-half of the length of the body.

Q. I believe there has been evidence in this case to the effect that the running snake might be able to strike, and to strike farther than the length of his body.

[fols. 1909-1920] Q. Now, the fangs, are they saw-tooth, or smooth? Are they like the edge of a saw, or are they smooth?

A. They are smooth, round and smooth.

[fol. 1921] EVA MURPHY, recalled as a witness in behalf of the Defendant, having been heretofore duly sworn, testified as follows:

Direct examination.

By Mr. Parsons:

Q. Mrs. Murphy, will you please talk so we can all hear you?

[fol. 1922] A. Yes, sir.

Q. You have been previously sworn, have you not?

A. Yes, sir.

Q. And the defendant here, Robert S. James, is your brother?

A. Yes, sir.

Q. And you reside in Birmingham, do you?

A. In Morris, Alabama.

Q. That is out of Birmingham?

A. Yes.

Q. What is your occupation there?

A. I am evening chief operator with the telephone company.

Q. Directing your attention to July, 1935, did you visit your brother?

A. Yes, sir.

Q. And where did you visit your brother?

A. At the residence at 1329 North Verdugo Road.

Q. La Canada?

A. Yes, sir.

Q. You came here from Alabama, did you?

A. Yes, sir.

Q. And when did you arrive?

A. On June 30th.

Q. June 30th?

A. Yes, sir.

Q. By whom, if anybody, were you met when you arrived [fol. 1923] in Los Angeles?

A. I was met at the station by Mr. and Mrs. James and Mr. and Mrs. Smith and Lois Wright.

Q. By Mr. and Mrs. James you mean your brother and his deceased wife, Mary?

A. Yes.

Q. And they met you at the train?

A. Yes, sir.

Q. And from there where did you go?

A. To the residence.

Q. And how long did you remain at the residence?

A. I remained until July 14th.

Q. July 14th?

A. Yes, sir.

Q. And at that time did you leave for your home?

A. Yes, sir.

Q. In Alabama?

A. Yes, sir.

Q. Now, while you were here were you at the home of your brother and your-sister-in-law practically all of the time?

A. Yes sir, all except about one day and night that I spent with Mrs. Smith.

Q. That is your niece, Mrs. Smith.

A. Yes, sir.

Q. While you were at your brother's home was Mrs. James living there then?

[fol. 1924] A. Yes, sir.

Q. Was she there practically all of the time?

A. During the first week she was there every night that we were. The second week she was on a dentist convention at Long Beach.

Q. While you were at the home of your brother did you see the gentleman, Mr. Hope, who has testified here?

A. Yes, sir.

Q. And when did you first meet this man, Hope?

A. The first time I met him was on Sunday morning at the breakfast table. I had seen him before that time but that was the first time that I met him or exchanged any words with him.

Q. When was the first time that you had seen this man?

A. The first time I saw him was on about the first part of the week that I arrived which was July 3rd. He came to the residence one evening while my brother and I were in the garage doctoring some chickens.

Q. Do you recall about what time of the evening it was when Mr. Hope came there?

A. No, I can't recall any exact time, but I should judge that it was about 8:30 in the evening, because we had left from the barber shop and had gone home.

Q. It was some time after dinner?

A. No, it wasn't after dinner; it was while my sister-in-law was preparing dinner that we were in the garage doctoring the chickens.

[fol. 1925] Q. And where did you see, and under what circumstances did you see Mr. Hope upon that occasion?

A. He came into the garage while we were—my brother was sitting at the table and I was standing just at his side, holding the chicken, and he entered the garage and he said, "Hello, what about your chickens?" and Mr. James said, "Yes, I have some chickens."

Q. And what if anything did Mr. Hope or Mr. James do then?

A. Mr. Hope stated that he had had difficulty in finding the place—I don't recall just what words were used, other than he said it was an awfully hard place to find and Mr. James said, "Well, you are just about too drunk to know."

Q. What was Mr. Hope's condition at that time with reference to whether he was under the influence of intoxicating liquor?

A. Well, to me he appeared to be drunk.

Q. And what did Mr. Hope and Mr. James then do in your presence?

A. Well, Mr. Hope said that he had difficulty in finding the place, and about that time Mr. James raised to his feet and handed me the chicken that he had in his hand and I left the garage and started to the house.

Q. Did you see whether or not they remained in the garage or where they went, if any place?

A. They remained in the garage probably two or three minutes.

[fol. 1926] Q. And did you observe their movements?

A. Well, I stood at the back door just out—the door that enters the back and Mr. Hope's back was turned towards me, but I could see my brother's feet and Mr. Hope's back and I stood on the step while they stood in the garage.

Q. And did Mr. Hope leave shortly?

A. They both came out of the garage and walked down the driveway towards the street.

Q. And did you keep them under your observation during that time?

A. Well, I stepped off the step and walked to the left of the house, and watched them as they walked down the driveway, after they left beyond the front porch a distance I could not see very well, only the form.

Q. How long was your brother gone on that occasion?

A. Well, it was a very short time. I don't imagine it was over five minutes.

Q. Did your brother return then?

A. Yes, sir.

Q. And did you and he continue with the treatment of the chickens?

A. Yes, I went into the garage and waited for him to return.

Q. Did your brother have any considerable number of chickens on the place?

A. Yes, there were quite a few.

[fol. 1927] Q. How many?

A. Well, I don't really know the number. I would imagine about 50 or 60.

Q. Had you sent your brother some chickens?

A. No, I hadn't sent him any chickens.

Q. Now, upon that occasion, did you observe whether or not Mr. Hope had anything in his hand, any box or gunny sack or any package in his hands?

A. No, he did not carry anything. When he entered the garage, he put his hands into his pockets.

Q. Did Mr. Hope upon that occasion, upon that evening at any time that he was under your observation, did you see him with a box or package or sack or anything in his hand?

A. No.

Q. Now, when your brother returned from the car, did your brother have any box or package or sack or anything in his hands?

A. No, not anything.

Q. Now, while you were there, staying at the place, did you at any time see a box in any way similar to this box which I hold, defendant's C for identification?

A. No.

Q. And did you at any time, while you were visiting at the home of your brother, see any rattlesnakes or reptiles of any kind, any snakes?

A. No.

[fol. 1928] Q. Now, during the course of your visit, did you and your brother and Mrs. James go any place?

A. Yes, we went on the 4th of July, we went to Ocean Park.

Q. And did you go there to some of the side shows?

A. Yes, sir. We went into several of the exhibits.

Q. And did you attend an exhibit of snakes there?

A. Yes, sir.

Q. And who was with you at the time?

A. Mr. and Mrs. James.

Q. And how long were you folks in the snake exhibit?

A. Well, we were there quite a little while. I would imagine about an hour.

Q. Are you able to say whether any of the snake men, I will call them that, whom you have seen upon this trial, in attendance upon this trial were there any at that exhibit?

A. Yes, I recognized the man who talked to us about the snakes the first day I came into the courtroom.

Q. Was that a man by the name of Allman?

A. I don't recall his name, but he was a short, black headed man.

Q. A husky fellow, a husky man?

A. Well, I couldn't say that he was husky and he was not very tall and his complexion was very dark and I noticed him immediately when he left the courtroom.

Q. Now, when did you leave the home of your brother and start to return to Birmingham?

[fol. 1929] A. I left on July 14th.

Q. And did you see your sister just before you left—that is, your sister-in-law?

A. Yes, she came home over the week-end.

Q. And did your brother, Robert, see you off at the train?

A. Yes.

Q. Now, upon one of the Sundays that you were there, did you have occasion to have breakfast with the family?

A. Yes, I had breakfast three Sunday mornings.

Q. And do you recall any occasion upon which Mr. Hope was present at breakfast?

[fol. 1930] A. Yes, Mr. Hope was present at the breakfast table on the second Sunday morning I was there.

Q. Did you folks all have breakfast together?

A. Yes, sir.

Q. Who was present at the table?

A. Mr. and Mrs. James, Lois Wright, and Mr. Hope, and myself.

Q. And upon that occasion were you introduced, or made acquainted with Mr. Hope?

A. Yes, sir.

Q. And what was the manner of the introduction? What was said when he was introduced?

A. Well, Mr. Hope didn't come to the breakfast table just at the time that we did. We were seated at the table when he came in, and Mr. James introduced him as being his friend, Dr. Smith, a former medical student.

Q. And did Mr. Hope make any denial of that, or say anything at that time?

A. No.

Q. What was the condition of your sister-in-law, Mary, at that time, in reference to the state of her health?

A. Well, Mary had found that she was very nauseated, and at times she could not eat.

Q. Was she at that time pregnant?

A. Yes, she was.

Q. And was there any conversation held that morning [fol. 1931] at the breakfast table between you folks with reference to that subject?

Mr. Williams: That is objected to unless Hope was present.

By Mr. Parsons:

Q. In the presence of Mr. Hope at the breakfast table.

A. Yes, there was.

Q. Give us that, please.

A. Well, while we were seated at the table talking, the conversation came up, I don't know just who—but Mary seemed not to be able to eat, and she pushed her plate back saying, "I cannot eat." And so Mr. James said, "Well, honey, you know what is wrong, don't you?"; and she said, "Yes. I just cannot go through with this. I am going to the doctor and have something done."

Q. Did your brother make any reply?

A. He said, "Well, I don't guess you will, and I am not going with you, because we are going to have Bobby, Jr. at the house." She said, "If you don't you will take care of me."; and he said "Chuck" or "Shuck" would take care of her.

Q. Who was it that he called "Chuck" or "Shuck"?

A. Mr. Hope.

Q. The man that is in the courtroom at this time?

A. Yes, sir.

Q. Where was Lois at that time?

A. She had some argument about some food she was [fol. 1932] going to eat, and she left the table, and I cannot tell whether she came back by this time, or not, but she was at the table when we started breakfast.

Q. Now, how long was Mr. Hope at the house while you were there upon this visit in July?

A. Well, I cannot be certain as to the date that Mr. Hope was there, but the night that he stayed was on Thursday, and he had breakfast the first Sunday morning, and then there were several mornings he had breakfast. As well as I remember, it was Monday, Tuesday and Wednesday.

Q. Did you see him again after that until this occurrence?

A. No, I hadn't seen him any more since.

Q. Now, while you were visiting at your brother's home, did you go about the premises, and in the yard?

A. Yes, I used the premises quite a bit, in the back, and around the garage, and in the back yard, and in the chicken house.

Q. Were you helping your brother from time to time look after the chickens?

A. Yes, every night that we were home that we didn't go out, we were at home doctoring the chickens.

Q. Now, your brother, the defendant here, has been a chicken fancier for years, has he not?

A. Yes, sir.

Q. Now, Mrs. Murphy, would you be kind enough to turn and look at this plat, People's Exhibit No. 2, and this pur-[fol. 1933] ports to be a plat of the premises at your brother's home at that time, 1329 North Verdugo Road, and to aid you, the top is north, and the right is east, and the left is west, and the bottom is the south. Now, at the southerly portion of the plat is marked "House" where a figure is drawn, and to the left of that is a figure which is marked "Fish pond". Then these appear to be walkways, and they are marked in gray. To the right or east of the first one is marked "Driveway". To the rear of the house is a table, and then a walkway west of that. Then there appears to be a wider walkway extending almost to the driveway. These marks to the extreme east and west, or right and left of the plat, purport to be the property line. Some distance back from the house is a figure marked "Garage". To the left of that is marked "Gate". Here and there about the fish pond there are some figures done in green

which represent shrubbery for the purpose of this plat. At the fence there is some shrubbery, that is, at the back fence, at the rear of the garage. Then there is a walkway to the place marked "Chicken House", and then another chicken yard, and then to the right is a goat pen, and to the rear is marked "incinerator", to the north. Now, with that in mind, are you now familiar with the plat as being a plat of the premises of your brother's home at that time?

A. Yes, sir.

Q. And did you have occasion to spend some time in the [fol. 1934] back yard, immediately in the rear of the house, or in the vicinity of the fish pond?

A. Yes, I was in the chicken yard, and the garage, almost every day, or in the evening.

Q. And you notice along the driveway, drawn in blue pencil, a mark which extends in a northerly direction up the driveway to a point immediately east of the crosswalk that leads to the rear, or to the north of the house and fish pond, and then the blue mark extends across the walkway to the west. Particularly directing your attention to the area marked with this blue line across the crosswalk, running more east and west, have you been in that vicinity, or were you while you were there in July?

A. Yes, I was all over the back yard.

Q. And have you ever had occasion to stand upon this walkway and observe the vicinity of the fish pond?

A. Well, I couldn't say that I made any particular observation, but as well as I remember—

Q. Could you see the fish pond when you were standing in this position on the crosswalk?

A. Yes, I surely could.

Q. And is it now your recollection that you did see it?

A. Yes, sir.

Q. Were you able to see the curbing, and the walkway to the east of the fish pond, indicating this portion around the circular portion of the fish pond?

[fols. 1935-1940] A. I don't recall making a certain observation, but I am of the opinion that it could be seen.

[fol. 1941] MRS. PEARL WIER, called as a witness in behalf of the Defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Pearl Wier.

Direct examination.

By Mr. Parsons:

Q. Now, Mrs. Wier, we have considerable competition here one way and another, and you must speak up. You talk to this gentleman down at the end of the jury box, so that all the jurors can hear you. What is your name, please?

A. Pearl Wier.

Q. Where do you reside?

A. On 78th Place in Los Angeles.

Q. Do you know Robert S. James, the defendant here?

A. Yes, I do.

Q. How long have you known him approximately?

[fol. 1942] A. About 10 years.

Q. And did you know Mrs. Mary Busch James, the deceased?

A. I did.

Q. Have you ever been to the premises at 1329 Verdugo Road?

A. I have been.

Q. When was the first time that you had occasion to go there?

A. I went there with them the day they leased the place.

Q. You went there with them. By "them," do you mean Mr. and Mrs. James?

A. And Lois.

Q. And Lois Wright?

A. Right. And my husband.

Q. That was the day that they leased the place?

A. It was.

Q. From time to time during the married life of Mr. and Mrs. James did you see them occasionally?

A. I didn't see them again, no.

Q. That was the last time you saw them?

A. Yes, sir.

Q. But you had seen them together, had you?

A. Yes, I had.

Q. What did you observe about these people with reference to whether they treated one another in a kind and affectionate manner?

A. They seemed to care very much for each other, very [fol. 1943] much in love.

Q. Were they affectionate?

A. Yes.

Q. Did you sometime in the month of July, 1935, have a conversation with Mrs. James with reference to the subject of her being in a family way?

A. My conversation——

Mr. Barnes: Just a minute, may we have that answer categorically?

The Court: Yes. Just answer "yes" or "no."

A. No.

By Mr. Parsons:

Q. Yes?

A. No.

Q. Do you know whether she was pregnant?

Mr. Barnes: Objected to as calling for a conclusion of the witness.

The Court: Objection sustained.

By Mr. Parsons:

Q. Did you have a discussion in the summer of 1935 with Mrs. James with reference to whether or not she was pregnant——

Mr. Barnes: Just a minute——

Mr. Parsons: Pardon me; as to whether or not she was pregnant.

Mr. Barnes: That is objected to on the ground it is hearsay.

The Court: You can answer "yes" or "no."

[fol. 1944] A. Yes, I had a conversation.

By Mr. Parsons:

Q. You did?

A. I did.

Q. And did you have a conversation in the summer of 1935 with Mrs. James with reference to the subject of her doing something to terminate her pregnancy?

A. Yes, sir.

Mr. Barnes: That is objected to——
The Court: The answer may stand.

By Mr. Parsons:

Q. Now, Mrs. Wier, did you have an occasion upon the visit which you made to the premises of 1329 Verdugo, with Mr. and Mrs. James to go about the yard to look the place over?

A. I did.

Q. And if you will just turn this way a little, Mrs. Wier, so that I may point out this map to you. This is People's Exhibit 2, and purports to be a plat of the premises at 1329 Verdugo Road. The top is north and the right hand is east and west is the left side and the bottom of the map is south. This first square exhibit here, or marking, illustrates the house. To the left is the fish pond. To the right of the premises is what purports to be a driveway. That extends back to the garage. This object marked here is the garage. Then, there is in gray another walkway extending east and west almost across the property to the rear of the house between the house and the garage.

[fol. 1945] Now, did you have occasion—pardon me; strike that. You will notice going in a northerly direction upon the driveway to the cross walk is a blue line drawn with a blue pencil which turns sharply to the left and goes on the walkway almost to the westerly line of the—following this walkway which runs in an easterly and westerly direction across the premises, the westerly line of the premises. Did you have occasion to go on these premises in the vicinity of this walkway that runs easterly and westerly across the lot?

A. I did.

Q. And did you have an occasion—and when was that?

A. We were living over there——

Q. When was that?

A. I think that was two weeks after Easter of 1935.

Q. And upon that occasion, did you stand in the vicinity of the walk upon which this blue line is drawn?

A. I did. By the table there.

Q. On the back of this table?

A. Yes, sir.

Q. Meaning this table between the walkway and the house?

A. Yes, sir.

Q. Did you have occasion to look in the direction of the fish pond?

A. I went all around it.

Q. From the position you stood in on the walkway, which [fol. 1946] runs in an easterly and westerly direction, were you able and did you see the fish pond?

A. I did.

Q. Did you see the walkway around the fish pond, particularly to the east of the fish pond?

A. I did, and made remarks about it.

Mr. Parsons: Cross examine.

By Mr. Williams:

Q. What did you say your address was.

A. 1862 78th Place.

Q. What is your husband's name?

A. J. C. Wier.

Q. The only time that you were at the premises that you have been talking about was either late in April or early in May of 1935?

A. Yes.

Q. You were there for how long?

A. We were there practically the entire afternoon.

Q. And you have never been there since?

A. No, I have not.

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[fol. 1947] CHARLES MARTIN, called as a witness in behalf of the Defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Charles Martin.

Direct examination.

By Mr. Parsons:

Q. Mr. Martin, what is your business or occupation?

A. Barber.

Q. Barber?

A. Yes, sir.

Q. Where are you now employed?

A. 522 West 8th Street.

Q. And Mr. Martin, will you keep your voice up so that those folks at the end of the jury box can hear you?

A. Yes, sir.

Q. How long have you been employed at that establishment?

A. Two years last February.

Q. And do you know the defendant who sits here, Mr. Robert S. James?

A. I have known him since I started working for him two years ago last February.

Q. You started working for him two years ago last February?

A. Yes.

Q. And during the year 1935, were you employed by the [fol. 1948] defendant?

A. Yes, sir.

Q. Directing your attention to August 5th, 1935, do you recall having seen Mr. James on that day?

A. Yes, sir.

Q. And shortly after that day was your attention particularly directed to that day by the happening of some event?

A. He came in Sunday morning and I said, "Good morning"—

Q. Perhaps you didn't understand me. Did you learn of the death of Mrs. James on or about August 5th, 1935?

A. That was Monday?

Q. Yes.

A. Now, Mrs. Lueck telephoned to me Tuesday morning.

Q. Tuesday morning you heard of her death from Mrs. Lueck, is that right?

A. Yes.

Q. And now directing your attention to Monday, August 5th, did you see Mr. James upon the morning of that day?

A. On August 5th?

A. Yes, sir.

A. Yes.

Q. And about what hour of the day did you first see Mr. James?

A. About 15 minutes to 9:00.

Q. And how close were you to Mr. James that morning?

A. Well, he passed by me almost—I should say he passed [fol. 1949] by me within two or three inches.

Q. Did he speak to you?

A. Yes, sir.

Q. Did he say "Good morning" to you?

A. He said, "Good morning."

Q. Did you smell the odor of alcohol on his breath and about his person.

A. No, sir.

Q. Did you observe whether or not he was intoxicated?

A. He was not intoxicated that I could see.

Q. Was there anything about his conduct or actions or appearance that morning that was different from anyone of the many mornings that you saw him upon his arrival at work?

A. I couldn't see anything.

Q. During the course of the day did Mr. James leave the establishment at all?

A. He left about 1 o'clock for lunch and he was out about 20 to 25 minutes.

Q. Do you recall whether or not throughout the day he was working upon the trade, his customers?

A. Yes, in the regular routine of everyday work. I remember some of the customers he worked on some of them that were waiting for him when he was out to lunch.

Q. Do you recall any particular person who was waiting for him when he was out to lunch?

A. Yes, sir, Mrs. Osborne with her three little daughters. [fol. 1950]

Q. Did he take care of the children's needs?

A. One of them.

Q. After he returned?

A. Yes, sir, he took care of one of them.

Q. Was that the occasion of your particularly noticing how long Mr. James was out for lunch?

A. It certainly wasn't over 25 minutes or thereabouts.

Q. These folks were waiting for him to return, were they?

A. They were awaiting his return, because he usually did the work of one of the girls.

Q. Were they waiting for Mr. James to return from lunch that he might serve them?

A. Yes, sir.

Q. Now, on the previous Saturday, August 3rd, did you see Mr. James upon that day?

A. Saturday?

Q. Saturday evening, did you see Mr. James?

A. Oh, yes.

Q. And do you know how late Mr. James worked that day?

A. Why, he must have left the place around 8:00, between 7:30 and 8:00 o'clock.

Q. Between 7:30 and 8:00. That was his usual time of leaving was it?

A. That was the usual time, yes.

Q. Was that the time upon this particular occasion?

A. Yes.

[fol. 1951] Q. Now, what time did he close the shop as to receiving patrons?

A. Well, we closed up at 7:00. We went home at 7:00 if there was nothing doing, but we never turned any of our friends down. We usually worked until we got through.

Q. Did you on that Saturday night?

A. Well, we usually worked a little after 7:00.

Q. What would Mr. James do after you locked up at 7:00 o'clock on Saturday night?

A. Well, he usually paid his help off.

Q. Would he count the money and check on it?

A. He would count the money and he usually left some change there for Monday morning because he arrived usually at 9 o'clock and we opened up at 8:00.

Q. Did you know Mrs. James, now deceased, Mary Busch James?

A. Yes.

Q. And she worked there in the shop, did she not?

A. Yes.

Q. And how long did you know her?

A. Well, since she started working there, from March sometime until her death.

Q. And did you have occasion to observe how Mr. James and Mrs. James acted toward one another and treated one another with reference to whether or not they were kind and affectionate and loving toward one another?

A. They were very affectionate so far as I could see.

[fols. 1952-2033] Q. Did Mr. James treat her apparently in a kind and considerate manner there in the shop?

A. Yes, sir.

Q. And do you recall an incident in July, 1935, of her having been away for a few days, and her return?

A. She was on her vacation at Long Beach, at least that is what I heard she was, and she came back about five days later, and they embraced each other in the barber shop.

Q. In the shop?

A. Yes, sir.

Q. And did they appear to be very happy at seeing one another?

A. Yes, sir.

Q. Were they affectionate toward one another?

A. Yes, sir.

Mr. Parsons: That is all.

Mr. Williams: I have no questions.

* * * * *

[fol. 2034] ROBERT S. JAMES, the defendant, recalled as a witness in his own behalf, having been previously sworn, testified as follows:

The Court: Let me have your full name again, please.

A. Robert S. James.

Direct examination.

By Mr. Parsons:

Q. You are the defendant in this matter, are you, Mr. James?

A. That is right.

Q. And Mr. James, did you ever have a conversation with Mr. Hope at the barber shop, in the City of Los Angeles, your barber shop, wherein in substance or effect you told him that you had a friend who wished to get rid of his wife, or some person, and that you would pay him if he would go out and purchase a rattlesnake, or rattlesnakes?

A. I never did.

Q. Now, Mr. James, did you ever, at any time, in substance or effect tell Mr. Hope that you wanted him to purchase a rattlesnake or rattlesnakes, for you or any other person?

A. I did not.

Q. Did you ever at any time tell Mr. Hope that you wanted him to purchase for you or any other person a box?

A. I did not.

Q. How long have you known Mr. Hope?

[fol. 2035] A. I have known him about seven or eight years.

Q. And did you ever tell Mr. Hope, in substance or effect, that you were a killer, and that you wanted to kill your wife, Mary?

A. I never thought of such a thing.

Q. Did you ever tell Mr. Hope that?

A. No.

Q. Did you ever tell Mr. Hope that you had some life insurance in your favor upon Mary's life, and that if he would aid you in killing her that you would pay him a portion of the insurance?

A. I did not.

Q. Now, Mr. James, did you, upon one occasion, receive or permit Mr. Hope to remain at your home?

A. Yes, I permitted him to remain at my home three or four days.

Q. When was that?

A. Well, he came to my home, I think it was the 6th of July, and stayed three or four days.

Q. Of last year?

A. Yes.

Q. And did you have any conversation with Mr. Hope with reference to the circumstances under which he wished to come to your home?

A. Yes.

Q. What did he say to you?

[fol. 2036] A. Well, he came to my house the 3rd of July about 8:00 o'clock at night, and he wanted to spend the night. He was drinking, and I wouldn't let him spend the night. I told him my sister was there, and that she wouldn't like it. He asked me to loan him a dollar so he could have a place to sleep.

Q. Now, where was it that you talked to Mr. Hope upon that occasion, on the 3rd of July?

A. Well, I was in my garage when he first came in. I was treating some chickens I had for a cold, and my sister was helping me. He came to the garage and spoke to me. He said, "This is Dr. James, I see." I told him it was, that I was doctoring some chickens. So he talked to me a little bit. I don't remember everything he said, and pretty soon he called me outside, and said he wanted to speak to me, as though he didn't want my sister to hear what he had to say to me, and he told me he had had a fight with his girl, and that she had run him away from home, and that he didn't have any money, and he wanted to stay that night.

He was pretty intoxicated. That is when I told him he couldn't stay. There was more conversation. Do you want that?

Q. Yes, please.

A. I walked out of the garage, and I walked down the driveway with him, and I told him he couldn't stay all night. He asked me to loan him a dollar. I asked him why he didn't go to work and get him a job. He said he was doing [fol. 2037] experimenting now in chemistry, and pretty soon he would be able to have him a job, but he wanted to stay with me until he was able to get on his feet. I said, "If you will come back to my house sober, and promise not to drink while you are here, I will let you stay, because I have a spare room here that I don't need." He said, "I will be back tomorrow night sober," and I gave him the dollar, and started to leave, and he began to tell me about his experimenting in the laboratory work. He had a little tin box with some yellow stuff in it. He called it rattlesnake venom. I don't know what it was. I had never seen any of it before. He told me about his experiments. He wanted to experiment with a chicken I had. He said, "I would like for you to cut one of them on the leg, and rub it on there, and see what it will do." I thought he was intoxicated, and I told him "No," and I took him to his car, and he got in his car and left.

Q. When next did you see him after that?

A. I saw him next Saturday, the 6th.

Q. And where was it you saw him on the 6th?

A. He came to the barber shop.

Q. At about what time of the day?

A. Well, I don't remember. I was pretty busy when he came in there. It was some time in the afternoon.

Q. Did you see him later that night?

A. He came to the barber shop and told me he wanted to [fol. 2038] come up and stay a while, and I gave him a key to the house. I told him I didn't know what time we would be home, and I gave him the key, and he came sometime that night; I don't know what time he came in.

Q. In any event, was he there when the family arose, when you arose on the following Sunday morning?

A. He was there Sunday morning, and had breakfast with us.

Q. And who was present at the breakfast table?

A. My wife, my sister and Lois Wright, my niece.

Q. Was Mr. Hope there?

A. Yes.

Q. And at that time was there any conversation at the breakfast table among you folks?

A. Yes, there was quite a little conversation.

Q. In what manner did you introduce Mr. Hope to any of the folks there, if you did?

A. Well, I went to his room, and I brought him in to breakfast, and I introduced him to my wife and my sister, and I don't know whether Lois met him, or not. That is the way I introduced him.

Q. And how did you introduce him?

A. I introduced him as Dr. Smith.

Q. Had you had any conversation with Mr. Hope with reference to that matter?

A. He wanted me to introduce him that way, that he was [fol. 2039] having trouble with his wife, his former wife, and he didn't want her to know his whereabouts.

Q. And at that time what was the condition of your wife, Mary, with reference to the state of her health?

A. Well, the whole thing that was wrong with her health was that she was pregnant, and she began to be very nauseated from it.

Q. And she had been sick for a few days?

A. Yes, she had been nauseated for several days.

Q. And was there any conversation at the breakfast table with reference to her nausea, and her condition?

A. There was.

Q. What was that conversation?

A. Well, she was not able to eat any breakfast, and I began to tease her about not being able to eat, and she pushed her plate back.

Q. Keep your voice up, please.

A. I told her, "You know why you cannot eat, don't you?" and she said, "Yes, but," she said, "I am not going to go through with it, because it is terrible. I want you to take me to a Doctor." And I said, "I am not going to take you to any doctor. We are going to have a little baby."

Q. Just continue, please.

A. I don't know just what all was said about it, but I was more or less kidding her, and finally she said, "Dr. Hope will take care of me. I will get you to help me," [fol. 2040] and he said, "You bet I will."

Q. Now, were you pleased and happy when you learned that your wife was in this condition, in a family way?

A. Yes, I was pleased about it.

Q. And how did Mrs. James feel about it?

A. Well, she was very pleased about it at the time. The conversation at the breakfast table was more or less kidding.

Q. And subsequently, or rather after that conversation on that Sunday morning, how long was Mr. Hope a guest at your home?

A. He stayed there, I think, until Wednesday.

Q. And when did you see him again after that?

A. Well, he left there Wednesday, and I didn't see him again until—I don't recall seeing him any more until the 3rd of July.

Q. August, you mean?

A. The 3rd of August, yes.

Q. Now, upon the 3rd of August did you meet Mr. Hope at about 5:30 or 6:00 o'clock in the evening, and take delivery from him of a rattlesnake?

A. No.

Q. Now, did Mr. Hope, at any time, ever deliver to you, or leave at your premises, with your permission, a rattlesnake?

A. He never did.

Q. Did he ever give you one downtown any place?

A. He never did.

[fol. 2041] Q. Now, did you ever meet Mr. Hope on Sunday, August 4th, and take Mr. Hope in your house, and there put your wife's foot in a box with a snake?

A. I did not.

Q. Did you ever contemplate, or think of such a thing?

A. I never thought of such a thing, and I never heard of such a thing.

Q. Now, did you ever let Mr. Hope have your automobile from time to time?

A. Many a time I have let him have my automobile.

Q. Just a loan, you loaned him the car?

A. That is right.

Q. And have you from time to time given him small sums of money, or loaned him money?

A. Yes, ever since I have known him I loaned him money, gave him money in the barber shop, and helped him out.

Q. And that extended over a period of years?

A. Right up until now.

Q. Now, did you ever, with Mr. Hope, alone or otherwise, do anything to your wife, Mary, to bring about her death?

A. I never did.

Q. Now, did you ever take your wife, Mary, with Mr. Hope, or some other person, or at all, and carry her, drag her out of the house, and throw her in the fish pond?

A. No.

Q. Did you ever think of such a thing?

[fol. 2042] A. No, I never thought of such a thing.

Q. Now you had rented this house out on Verdugo Road, and had lived there some little time before your wife passed away, had you not?

A. Yes, sir, that is right.

Q. And had you spent considerable time upon the premises of your property there?

A. Well, I was there every day.

Q. And were you raising chickens there?

A. Yes, I had 50 or 60 game chickens, and three or four bulldogs.

Q. Now, Mr. James, directing your attention to the plat here upon the board, and I will indicate the map to you, Plat No. 1, People's No. 1, to the right-hand is east, and to the left is west, and the top is north, and the bottom is the south. This represents, apparently, a diagram of your home, indicating at the bottom of the map the porch, living room, dining room, bedroom, hallway, and then the kitchen to the extreme east of the house, and then the extreme northeast corner is a porch, and to the left is the bathroom, and in the northwest corner is another bedroom. Then to the west of the house there is marked on the map a semi-circular figure to represent the fish pond. Around that circular figure a line in black ink representing a walkway. To the extreme right, and in black lines, is what is marked there as the driveway. And then across the rear part of the house [fol. 2043] is a mark in gray, between two black lines, indicating a walkway. To the north of the house is the cement table.

Now, directing your attention to another plat, Plat No. 2, People's Exhibit No. 2, the top is north, and the right is east, and the left is west, and the bottom is south. In gray here is indicated a driveway to the east, or righthand side of the plat. And to the extreme south is marked "House", and to the left is the fish pond, and in gray around that is

an area between two black lines, indicating a walkway. The walkway extends to the rear of the house, apparently. At the back of the house is a table. The walkway, the east and west walkway, extends to a larger walkway, done in gray, about an inch wide, which apparently extends clear across the premises. These lines on the east and west in black are apparently the lines of the property. Then the garage is here, and the gate here, and a walkway leading to the back. A chicken yard, and chicken house, another chicken yard and shed, and to the extreme north is the incinerator, and to the right is a tent. Now, down on People's Exhibit 2 there are various areas indicating shrubbery of one sort and another.

Now, have you spent, and did you spend, prior to August 5th, considerable time in that back yard?

A. I watered that shrubbery every morning.

Q. And did you look after your chickens there?

A. I did.

[fol. 2044] Q. How much poultry did you have?

A. I had 50 or 60 chickens.

Q. And you cared for them yourself, didn't you?

A. Well, while my wife was working I took care of them, but when she was home she took care of the chickens mostly herself.

Q. Now, directing your attention to a blue mark which runs by the driveway to the east of the house, and this other shrubbery to the left on the plat, and to the west, following the walkway to the rear of the fish pond, were you familiar with this area on the walkway, which extends in an easterly and westerly direction across the property to the north of the fish pond?

A. Very familiar with it.

Q. And from a position at about the center of the plat, where the walkways meet, the east and west walkway meets the walkway that extends to the north, were you able to see clearly the fish pond and the surroundings?

[fol. 2045] A. You couldn't help but see the fish pond if you looked that way.

Q. And I show you a photograph and ask you to examine that please and I will ask you if that is a fair representation of the view of the fish pond from the position on the walkway, east and west walkway.

A. Very good.

Mr. Parsons: I will offer this in evidence as People's Exhibit next in order.

Mr. Williams: We have no objection, but may I ask whether counsel will inform us when those pictures were taken?

Mr. Parsons: Recently.

Mr. Williams: Since Mrs. Henry took the stand?

Mr. Parsons: Yes.

The Court: Mark it H in evidence.

Mr. Parsons: Is that a fair representation of the condition as it appeared in the vicinity of the fish pond from the east and west walkway, about the 5th of August, 1935?

A. I would say that it was.

Q. And I show you another photograph. Will you examine that, please? I will ask you if that appears to be a fair representation of the view of the fish pond from a position on the east and west walkway?

A. Yes, it is.

Q. And is that a fair representation of the manner in which the area appeared on or about August 5th, 1935?

[fol. 2046] A. Yes, it is.

Mr. Parsons: I will offer that in evidence.

The Court: Mark it I in evidence.

By Mr. Parsons:

Q. I will show you another photograph, Mr. James and ask you if that is a fair representation of the view of the fish pond and the area surrounding it from another position nearby on the east and west walkway?

A. It is.

Q. And is that a fair representation of the conditions as they appeared there on or about August 5th, 1935?

A. I think so.

Mr. Parsons: I will offer this in evidence as Defendant's next in number.

The Court: Mark it J in evidence.

Mr. Parsons: May I pass these to the jury at this moment for observation?

The Court: Yes, you may.

Mr. Parsons: Possibly this might be a good time for them to examine them.

The Court: Very well.

A Juror: May I get my glasses?

The Court: Yes, certainly.

Mr. Parsons: Perhaps we had better wait until the jury has examined the photographs.

The Court: Yes.

(Photographs examined by the jury.)

[fol. 2047] By Mr. Parsons:

Q. Now, Mr. James, did you ever at any time pay Mr. Hope any money for the purpose of aiding or assisting you or any person in any way to kill your wife, Mary?

A. I did not.

Q. Now, how long had you known Mary at the time of her death, approximately?

A. I met her about the 1st of March of that year.

Q. And did she work for you?

A. Yes, she applied to my beauty shop for a position.

Q. And you were then operating a barber shop and beauty shop here in Los Angeles?

A. Well, I was operating a barber shop and I had a beauty shop in the rear unfurnished, and the people were moving out with their beauty shop and I was going to install my beauty shop, and that is why I was in need of a beauty operator and I installed the beauty shop and she had the job.

Q. And during the time that you operated this establishment, and before the death of your wife, Mary, was she almost continuously at your place of business in charge of the beauty shop, part of your business?

A. She worked there up until the time that she went to Long Beach to the convention.

Q. And that, however, was but a few days visit, is that right?

A. She was there about a week.

Q. Now, was your wife a good helpmate? Did she aid [fol. 2048] in operating your business?

A. She helped me in most every way.

Q. Was she kind and good to you?

A. We never had a cross word.

Q. And did she appear to think a great deal of you?

A. She did.

Q. And did you think considerable of her?

A. I did.

Q. And were you people happy out there on Verdugo Road?

A. We were just as happy as we could be.

Q. And this little place that you had rented out there in the hills, was she with you when you rented it?

A. Yes.

Q. And was she happy there?

A. Yes, she seemed to be.

Q. How is that?

A. Yes, she seemed to be.

Q. And Mr. James, did you, ever at any time aid Mary, or suggest to her, that she take out any life insurance with a view of your own in some manner to kill her in order that you might be able to collect the insurance?

A. I have aided her in taking out insurance, but not with that in mind.

Q. Did you ever at any time consider killing your wife, Mary?

A. No.

[fol. 2049] Q. Did you have any desire to?

A. No.

Q. Now, what was your financial condition in 1935, the summer of 1935? Did you own this business?

A. Yes, I owned my business and I had some money to put in my beauty shop. I didn't owe anybody anything. I had a little money in the bank, I don't know, \$400.00 or \$500.00.

Q. Was your establishment clear of indebtedness?

A. It was. I did not owe anybody a nickel.

Q. And were you and Mary making this sum of money that enabled you to live in the manner you wanted to?

A. We had plenty to be comfortable on.

Q. Did you have any pressing debts or obligations at that time of any kind?

A. I didn't have any debts. And I had a new car and it was paid for and my business, and it was paid for, and I didn't owe anybody anything.

Mr. Parsons: May we take the noon recess at this time?

The Court: We will take our recess at this time. Just one minute, ladies and gentlemen of the jury. My attention has been called to the fact that there appears in the last

issue of Liberty Magazine some reference to this case. You are particularly cautioned not to read any portion of that until the case is finally submitted to you.

Mr. Parsons: If I may state, your Honor, your Honor has repeatedly instructed the jury but for the last three days I [fol. 2050] have paid particular attention to the radio broadcasts and they have almost reenactments of some of the things that have taken place in the courtroom with considerable comment thereupon which I think that no one connected with this case should listen to.

The Court: Thank you, Mr. Parsons, I think we are very desirous and everyone throughout the course of this trial to be fair to the carrying on of this trial and I say this in fairness to counsel and I think it is a compliment to counsel and to carry out that idea I am going to ask the jury to cooperate. Refrain from any possibility of getting any idea or suggestion from anything on the outside and if you should be present when anything is told over the radio or spoken words of any kind, do all in your power to avoid hearing or seeing that, because we are going to do all we can to have a decision made in this case solely on the evidence and the law as given you here in court. I am merely cautioning you out of the super abundance of caution. I should regret that even the slightest criticism could be made to the conduct of this trial. You may be excused until 2 o'clock, and the audience will remain seated until the jury has retired.

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[fol. 2051] ROBERT S. JAMES, resumed the stand and testified as follows:

Mr. Parsons: What was the last question and answer?

(Record read by the reporter.)

By Mr. Parsons:

Q. Another subject, Mr. James, for a moment, referring to the fish pond at the west of the house, and the area of the walkway, now do you recall in August 1935 of any position along the walkway that extends in an easterly and westerly direction, from which one may see the east side of the fish pond?

A. I would say that there wasn't any place on the walk that couldn't see both sides of the fish pond.

Q. I see.

A. Very clearly.

Q. Now, Mr. James, did you ever have any conversation with your nephew with reference to the change of beneficiary on the life insurance from yourself to your sister or any other person?

Mr. Williams: That is objected to, if your Honor please, as not being relevant to any issue involved in the case.

The Court: May I have the question again?

[fol. 2052] (Question read by the reporter.)

The Court: Objection sustained.

By Mr. Parsons:

Q. Now, Mr. James, with reference to your trip to Colorado, you and your wife Winona made a trip to Colorado, did you not?

A. We did.

Q. And at that time what was your destination, at the time that you left Los Angeles?

A. We were on a trip to Birmingham, Alabama, to see my people.

Q. When you left Los Angeles did you have in mind stopping en route some place to Birmingham?

A. Yes, we had some business in Colorado Springs to take care of. We were going to rent a farm there that belonged to my wife's mother, to a gentleman who wanted to rent it for the next year. That was our business in stopping there.

Q. Did you go to Colorado Springs?

A. We did.

Q. And by what means did you go to Colorado Springs?

A. We went there by automobile.

Q. What car was it, whose car was it?

A. My car, a Studebaker coupe.

Q. And did you make a trip while you were at Colorado Springs to Pike's Peak on a sightseeing tour?

A. We did.

Q. How long were you at the top of Pike's Peak?

[fol. 2053] A. Well, we left Colorado Springs about noon. I don't know how long it took to drive up there. It may have been an hour or so. We stayed up there until about 5 o'clock that evening.

Q. And how long were you coming down the mountain side before something unusual happened?

A. Well, I don't know how long. We had only driven about three miles, and of course, you drive in second gear down there, very slowly.

Q. And now, I will direct your attention to an exhibit here, People's Exhibit No. 39. Will you examine that, please? That is a drawing made by Mr. Rogers, the gentleman from Colorado. Does that appear to be a somewhat fair representation of that switch-back or curved highway coming down off the mountain?

A. The switch-back is all right, but the car didn't go over where he says it did.

Q. Will you take this pointer, please, and step over here and point to where the car went off the road?

A. The car went off the road right here. It didn't make any bend at all.

Q. Just a minute, I will get a piece of chalk and mark that if I may. Now, will you just tell these folks where the car went off the road?

A. The car as we were coming on this straight-of-way here, the tracks showed that night and the car went right [fol. 2054] straight over here, didn't make any bend over here at all, but it did stop about where the man says it did.

Q. Now, will you draw a line illustrating where the car went off the road?

A. I will say it went off the road right here.

Q. Now, I will mark the start of that "J-1" and the end of that mark "J-2". Just take your seat now, Mr. James. And because I am near you, do not let your voice drop, please. Now, about how far did the car travel, did you observe, after you saw the car had come to rest? About how far did it travel from the highway?

A. I estimated it at between 150 and 200 feet.

Q. And was that your best judgment from what you saw?

A. Yes, it was my best judgment.

Q. And as you left the automobile after the accident, describe what you did.

A. Well, when we went over the embankment there, my wife was driving the car and I was looking through some field glasses through the window, and I did not know that the car was going over the bank until I felt it take its lunge. Of course, I hardly knew, rolling through the air, what was going on. I didn't know really when the car was stopped

because I was knocked unconscious some way or another, but when I came to, I was about 25 feet to the right of that car and my wife was just barely in the car and barely out. The disc wheels on this car,—and you know what disc [fol. 2055] wheels are—in rolling over the mountain had flattened out. They were flat as a pancake and the car was sitting right on the ground. In fact, there was a lot of loose rocks piled up around the running board and her head was laying in those rocks. And the door on my side had been broke open and couldn't be closed and it was daylight when we went over the mountain and it was dead black when I came to. So I got up and went to the car and I found my hip and back was badly hurt.

I picked her up in my arms and saw her head bleeding. I only had matches. The lights on the car were broken and I had a flashlight and I couldn't find it, as I struck a match and asked her how bad she was hurt and she said, "Get a doctor."

That is all she would ever say* to me as she just kept groaning. Well, it was very cold up there, in fact, it was snowing a little bit and I was nearly frozen to death when I woke up. I tried to pick her up and put her in the car and my wife weighed 150 pounds and she was pretty heavy and my back being hurt, I couldn't get her in the car. She was sittin' down on the floor. I tried to get her in the seat and when I finally decided I couldn't get her in the car, I drug her out on the ground and I took some blankets out of the car and put one under her and one over her. I didn't know what to do about leaving her. I was afraid to leave her. I could hear an animal howling like I never heard before. I was afraid it was a mountain lion. I was afraid [fol. 2056] she would not be there if I left her there. I thought maybe I would shoot something along the road. I thought I would get that pistol and shoot and that somebody might hear. I couldn't find that. So, there was nothing to do. I knew she would die if I didn't get out of there, the way she was bleeding, and I was confused. I didn't know which way I had got in there. I couldn't see down in this pit which way to go, so I climbed back to the road and I happened to go back the way the car came down and when I reached the road I knew that we hadn't come very far from the top, so I started back towards the top. I mean towards the top of the mountain, and I must have walked a quarter of a mile. Of course, the mountain was

steep and my right leg was nearly paralyzed and I decided I would never be able to make it to the top of the mountain, so I turned back and went down toward Glen Cove. It was much further that way, but the walking was much easier. It must have been four or five miles. That is where I met the road camp men and they called an ambulance and took two trucks and seven or eight men and we started back. They asked me where we went off and I told them I didn't know where the car went off, but I would probably know when I got there, and we drove back up the road until we saw the tracks where the car went over and we stopped the truck and about seven of the men went down with a stretcher to get my wife, and one kept me up there, stayed with me. He said, "You aren't in any shape to try to go down there". That is where I particularly noticed the [fol. 2057] tracks on the road and they said the car hadn't even made a turn there. That is why I am so sure about the fact of the car leaving the road.

[fol. 2058] Q. Now, after she had been picked up and taken by ambulance, where was she taken to; Colorado Springs, to the hospital?

A. She was taken to the Bethel Hospital, in Colorado Springs.

Q. And did you go there as well?

A. They took me there and put me to bed that night. They told me that I had been so exposed that I was liable to have pneumonia, and they examined me and found that I was only bruised. I had no broken bones. The next morning at 7:00 o'clock my wife was in the room next to me, and I could hear her groaning all night. Of course, I didn't sleep any, but the next morning at 7:00 o'clock I heard her call for me, and I began to dress, and I was practically dressed when the nurse came to the room to get me, and I went into the room where she was, and she asked me what had happened, and I asked her if she didn't remember going over the mountain.

Mr. Williams: Just a minute. We object to any conversation.

Mr. Parsons: Just go ahead, without telling any conversation, and tell what you did. How long was she in the hospital, Mr. James?

A. I don't remember the days that she was in there. She was there until the doctor told me they had done all they

could for her, and it was perfectly all right to take her out [fol. 2059] to a cottage, or to a hotel, or some home.

Q. And did you then do that?

A. I did.

Q. And while she was in the hospital were your expenses some considerable item?

A. Yes, my expenses were \$7.00 a day for a room. Of course, I didn't know what the doctors would charge. I had three specialists with her, and I had two special nurses which were charging me \$6.00 a day. I only had \$150.00 in money when I left here, and when we had the wreck my purse was lost out of my pocket, and I was penniless. I didn't have a penny. The first thing the hospital wanted to know next morning was could I pay the bill. I told them that I didn't have any money with me, that I had lost my money, and that I was going out as quick as I was able to and see if it could be found, but that I did have a business in California, and that I would pay the bill, and that I had insurance that I could borrow money on, and I would assure them that I would pay the bill before I left there.

Q. Now, did you let one of the nurses go for a time, and did you remain with your wife a portion of the time at night?

A. Yes. I wired my father-in-law in North Dakota about the accident, and I wired her mother here, and sister, about the accident, and her father came to Colorado, and when he came he asked me my financial circumstances, and [fol. 2060] I told him just what had happened, and he loaned me \$100.00, and I told him about the nurses. He said it wasn't necessary for us both to be there at the hospital in the day, and we agreed to discharge the two special nurses that we had, and he was to stay at the hospital during the day. I stayed at the hotel during the day, and slept, and I stayed up with my wife during the night, because I was afraid she might get out of bed, or something, because she had always been a terrible sleep-walker, and I stayed awake every minute of the night to see that she couldn't get out of bed, and we saved \$12.00 a day by discharging the special nurses.

Q. How long, approximately, was she in the hospital in Colorado Springs?

A. I don't know whether it was three or four weeks.

Q. And did you then take her to this little place at Manitou?

A. Yes, I wanted to take her to Mrs. Yarnell's house; that was a cousin of hers, and she didn't want to go there. She wanted me to get a cottage where she could be alone. She didn't like the hospital, and she didn't want to be there, so I went to Maniton, where she suggested me going, and rented a cottage, and I bought wood and coal, turned on the lights and gas, and prepared it for her, and took an ambulance and took her over there.

Q. Now, what were the circumstances under which you later found her one afternoon, one evening?

[fol. 2061] A. While I was there of course I took care of her the same as a nurse. I was up with her practically day and night. I just took a nap when I could. I had to bathe her. She was not allowed out of bed, and I prepared her meals, and I had to go to the grocery store, which was about a mile down the hill. I don't know the name of the little place down there, the Post Office; but I went down there every evening to buy the groceries for the next day, and she was doing a lot of letter writing, and I always went at 5:00 o'clock, and waited until the 5:00 o'clock mail was put up, and I would take the mail back to the house. The day of her death—a couple of days prior to that the doctor had visited my home, and he told me the hospital was very cross because I had not paid anything on her bill. Well, I had put in for a loan on an insurance policy on which I could borrow \$250.00. I put that in the next day after the accident, and I had not received it at that time. I told him I would go down the next day and see the insurance company and see why I hadn't got the money.

So the next day, after I had given her her lunch, and fixed her bed for the evening, changed the linen, and so forth, I don't know whether it was 1:00, or 1:30, but I walked down to this little place and I got a bus and I went in to Colorado Springs, and I visited the hospital and told them that I had been to the insurance company, and the check hadn't arrived, and they said they would find out what [fol. 2062] had happened to it, and I tried to satisfy the hospital that I would pay them soon. The ambulance company was bothering me for their money. They charged me \$35.00. I told them I would pay them as soon as I got the check.

I went over to the hotel where I stayed, where I was receiving my mail, and I didn't have any mail. I spent considerable time there. At the time I got ready to go back to

the town, after visiting all these places, I mean back home, it was about 4:30 when I got to the end of the business lane of this little town, where I received the mail. There I got my groceries, and the grocery boy was going my way, and I had gone up with him several times before, and he suggested that I ride with him, or maybe I told him that I would like to ride with him, and I rode with him, and when I got to the house I could see that my wife was out of bed, something that she had never done before, and she was not allowed to, unless I was with her with my arms around her, because the doctor gave me that permission. I looked into the bathroom, and I found my wife across the bath tub.

Q. Now, Mr. James, while you were upon the mountain-side, did you take a hammer and beat your wife about the head?

A. No, I did not.

Q. Did you have any intention, or any thought or desire to do such a thing?

A. I never thought of such a thing.

Q. Had you had the hammer out at all that day?

[fol. 2063] A. Well, the night we went into Colorado Springs I was driving pretty fast, and I had a puncture, and the rim seemed to be fastened by the lock, and it was necessary to hit it with the hammer to loosen the lock. Most anybody has had that experience in taking locks off. I keep tools in my car at all times. Being tired, and late at night, I might have left the hammer on the floor board, and it might have been there the next day.

Q. Now, after this accident did you dispose of your automobile there on the scene? Did you sell it?

A. Yes, it was so badly smashed that I sold it right where it was, for \$25.00.

Q. Now, directing your attention to this road that comes down off the mountain top, just briefly describe to the jury here what that road was made of? What was the surface of it?

A. Well, to my best knowledge it was a kind of dirt and gravel road. It was very narrow, and it was very scary looking.

Q. What was the condition with reference to there being any signs along the side of the road to place a car in immediate notice of a drop forward from the top of the mountain?

A. There were signs all along the top of the mountain

road, warning you to drive in second gear or you would burn your brakes out.

[fol. 2064] Q. Now, after this occurrence, after your wife had passed away there, did you return with her body to Los Angeles?

A. Yes, I brought her back here, and buried her at Forrest Lawn.

Q. Now, from time to time, in the last few years, have you given to your relatives in Alabama any money?

A. At the time of that accident—

Mr. Williams: Just a moment. I want to object to that, unless it be limited to a time after the death of Winona.

A. That is what I am going to tell.

Mr. Parsons: I think that is the question. I will make it a little more definite:

Q. After the passing away of Winona, did you from time to time give any of the members of your family, any of your relatives in Alabama, sums of money? If so, who were the persons, and approximately how much did you give them?

A. Well, I was mentally sick from that accident. I wasn't able to work, and I went to my sister's home, and I stayed there practically a year, in Birmingham, before I was able to go back to work. I accepted an insurance check that my wife had, for \$10,000.00. I gave my sister that check to deposit in the bank. She gave me about \$3,000.00 out of it, and she kept the rest of it, and spent it during the rest of the year. She had about three living with her, of my folks, they were out of work, and had no means of getting [fol. 2065] any work, and I felt sorry for her. She had always taken care of my mother, and I contributed to my sister, Mrs. Wright, who had four small children. When my mother died she left a lot of expenses on my sister, and she was in debt and owed \$3,000.00. I told her she could have the check, and as the year rolled on that check was distributed between she and Mrs. Wright, and my brother, and about all I used, whatever it was, was probably for my support.

When I left there about a year later to go back to California to go to work, I had to borrow \$100.00 off my brother to make the trip on.

Q. Now, after you returned to California, did you eventually set up a business here?

A. Yes, when I came back here I opened a barber shop, and I had just about money enough to make a down payment on it.

Q. And after you had returned from Alabama and opened up your business here in Los Angeles, you remained here practically all of the time, did you?

A. I have remained here since April, 1934, until now.

Q. Now, Mr. James, with reference to your wife Winona, and particularly the occasion when you were on the top of Pike's Peak, did you give her any whiskey, or did she take any whiskey?

A. No, she never took a drink of Whiskey in her life, that anybody could see.

[fol. 2066] Q. Was she a woman that ever drank?

A. She never drank a drop in her life.

Q. Now, referring to another subject for the moment, Mr. James, directing your attention to the occasion that has been testified to here concerning the occurrence on Verdugo Road, on the afternoon of August 4th, or the night of August 4th, 1935, did you at that time give to your wife, Mary, any Whiskey?

A. My wife, Mary, could not drink any whiskey at that time. She was so sick she could hardly keep a drink of water on her stomach.

Q. Well, did you give her any at all?

A. I did not.

Q. And you state at that time she was nauseated, and having trouble keeping water and food upon her stomach?

A. That is right.

Q. Now, Mr. James, after you were arrested, you have already related here the circumstances under which you were held out at your home on La Salle Street, from Sunday morning until Tuesday morning, at which time you were booked up here in the County jail. Now, after that time, on a Saturday, you were taken by the officers, were you not, and some discussion was held with you, is that right?

A. That is right.

Q. And about what time of day was that when the officers took you out of the jail, out of the jail tank?

[fol. 2067] A. Well, I don't know what time of day; I think it was between 11:00 and 1:00 o'clock.

Between 11:00 and 1:00. And when were you returned to your tank?

A. Well, they just took me back to the Chaplain's room,

and they had Hope there, and they told me the story he had told them. They asked me what I had to say about it. I told them I had nothing to say about it.

Q. Now, after that occurrence did you have some discussion with the officers off and on, lasting throughout the night, and into the early morning of the next morning?

A. Yes.

Q. And were the officers continuously talking with you from that time until early morning?

A. Yes, I hadn't any more than got back to my tank until they sent for me again, and they took me out of the jail.

Q. And this conversation with the officers was held where? In the District Attorney's office?

A. Well, for a while it was held there.

Q. And where else?

A. And they took me up to where I lived on Verdugo Road.

Q. Did they have some conversation with you there?

A. Yes.

Q. Then what did they do after the conversation on Verdugo Road?

A. They brought me back to the District Attorney's office. [fol. 2068] Q. And was the conversation continuous? Did they continue to talk to you?

A. Until 3:00 o'clock next morning.

Q. Now, a statement was read here by Miss Adams, a young lady reporter here. Do you recall having seen her down in the District Attorney's office upon that occasion?

A. Yes, I saw her down there.

Q. Now, do you remember whether or not you made the statements to her, and to the officers who were there present, that were attributed to you by the statement which she read here?

A. Well, I couldn't remember all that was in the statement. I remember some things that were in there, that I made.

Q. And what were the circumstances under which you made that statement? Tell us what occurred just before that happened?

A. Well, they had had me there constantly—

Mr. Williams: If your Honor please, I believe this has already been gone into on voir dire examination.

Mr. Parsons: That doesn't preclude me—we may offer

some testimony on voir dire, and then you put in the statement. I am endeavoring to speed up this trial, but there are one or two phases of it that I don't believe were fully covered.

Mr. Williams: We have no objection to anything in addition [fol. 2069] to what he has already testified to.

The Court: Suppose you go as far as you can. It may be necessary occasionally for you to cover some ground that you have covered before.

Mr. Parsons: I have no intention of doing it, your Honor.

The Court: You may proceed, then.

By Mr. Parsons:

Q. Mr. James, you remember having testified before about a good many of these items, and there are some other things which I wish to develop here. Now, prior to your making this statement down in the office of the District Attorney did you have any particular conversation with Mr. Pitts?

A. I did.

Q. What, if anything, did he say to you?

A. He was the one that was doing most of the talking. Do you want me to tell what he said?

Q. Yes, tell us what he said. I don't believe that you covered that fully.

A. Well, he read Hope's story over to me many, many times, and asked me what I knew about it, and I told him I knew nothing about it. He questioned me and questioned me about different things in Colorado, and everywhere else, and I told him I knew nothing about it. He continued to question me until later on in the evening. I was very sick. I was hungry; I was tired, and I told him a thousand times that I didn't know anything about Hope's story. About [fol. 2070] 10:00 or 11:00 o'clock that night he began to get pretty rough with me. He said, "Now, you have heard the story over and over, and we are going to clean it up, and you had just as well tell me now, because we will be sitting here until Monday morning." I still told him that I didn't know anything about the story; I had never heard of any rattlesnakes; I had never seen one, and that the whole story sounded screwy to me, and that I didn't understand the story. He told me that everybody in town was trying to storm the jail, that he had officers going around getting shot-

guns, going to keep the mob from lynching me. He tried to frighten me that way, and I told him that I didn't know anything about the story. About 12:00 o'clock all of the officers—there were about 15 or 20 around there all evening,—cleared the room and sent Mr. Jack Southard in to talk to me, and you heard me tell you just what Jack Southard told me he was going to do if I didn't give them the statement, and admit the things that they wanted me to admit. I didn't know the story. I had heard it. I had heard them tell it over and over and over, and when they told me that they was going to take me out to that house, and what they was going to do to me, I told them that if they wouldn't do it, I would try to tell them the story as I had heard it, and when I did try to tell them the story, every time I would get off the story one of the officers would stop me, and say, "Didn't this or that happen?", which I [fol. 2071] had promised them I would tell if they didn't take me out there and punish me any more. When I heard the story here the other day it was almost as new to me as it was to you folks.

Q. Were the statements that you made there to the officers, and reported by Miss Adams who testified here, were they given by you as the truth, or were they given by you to end this further questioning?

A. They were given by me to end this further questioning. There was none of it true.

Q. And immediately after your being indicted you went down here and entered a plea of not guilty, didn't you?

Mr. Williams: That is objected to, if your Honor please—

The Court: Objection sustained.

By Mr. Parsons:

Q. Now, Mr. James, did you have occasion to meet Miss Reed, this woman here who has testified, this Madge Reed, or Mrs. Reed?

A. Yes, I met her.

Q. What were the circumstances under which you met her?

A. I met her at the Italian Village one afternoon when I went down there to lunch, and I stayed down, and I had some cocktails. I got to drinking, and I became pretty intoxicated, and I didn't go back to my business that after-

noon. My wife was away on a convention, and I didn't feel so good when I went down there, and I got to drinking, and I stayed there until about 5:00 o'clock, and I felt like I [fol. 2072] wanted to go home, and I had got acquainted with her and some other woman. I asked her if she could drive a car. She said she could. I asked her to drive me home, that I was drinking, and I was afraid I might have an accident and get arrested, and she said she would drive me home, and on the way home she let this other woman out somewhere; I don't know where; but she did take me home. I don't know whether I passed out, or went to sleep on the way home, but when I woke up my wife was home bathing my face with cold water, about midnight.

Q. Now, did this woman ever have any conversation with you about money?

A. Yes, I saw her a day or two later when she came to my barber shop. She said she wanted to see me. She told me about taking me home. She said I promised to give her \$10.00, I believe. She said that my wife came home while she was there, and took her down to a bus, and she caught a taxicab to town, and spent \$3.00 for it, and spent \$1.00 for her dinner. She said I didn't give her any money, and that I owed her \$10.00. I gave it to her, and that was the last I seen of Madge Reed after my wife's death.

Q. Did you ever go down and stay all night at a hotel with this woman at Hermosa Beach, or any other place?

A. I never did.

[fol. 2073] Q. Did you ever tell this woman that you would give her a sum of money, \$1,000.00 or \$2,000.00, or any other sum to testify as a surprise witness or any other sort of a witness in your behalf in the event you were indicted?

A. I did not. I never thought of such a thing.

Q. Did you, by the way, ever tell Mr. Hope or ask Mr. Hope to testify that he had witnessed your marriage and that if he would so testify that you would pay him a sum of money, approximately \$1,000.00?

A. I never had any reason for wanting to tell the man I would pay him for seeing me married?

Q. Did you ever tell anybody such a thing?

A. Why no.

Q. Did you ever offer anybody any money to testify with reference to any matter in connection with this matter?

A. I did not.

Q. Have you offered any witness any money to testify

here in your behalf or in connection with any of these matters?

A. I never have.

Q. Now, with reference to the insurance that was taken out on your wife, Mary, just briefly relate the circumstances under which that insurance was taken out. Did you want a drink of water, Mr. James?

A. Please. When I met Mary, March, 1935, she came to my beauty shop to go to work.

Mr. Williams: Just a minute. I think the witness's answer [fol. 2074] should be limited to matters that are not hearsay. It is obvious that he is starting in a couple of months before there was any contact with any agent. Therefore, I object.

A. The agent was contacted—

Mr. Parsons: Just a minute, please.

The Court: Just a minute. Your attorney will take care of the questions.

Mr. Parsons: Perhaps the answer, the manner in which it came, is my fault for not specifically directing his attention. Mr. James, when was the first time the matter of insurance was discussed, with reference to your wife, Mary, with her?

A. About two weeks after she came to work for me around the 1st of March.

Q. And what were the circumstances under which that subject was discussed?

Mr. Williams: We ask that the witness be specifically directed not to relate any conversation between himself and Mary.

The Court: The conversation with Mary would be inadmissible. The fact that there was a conversation on the subject, however, would be admissible.

By Mr. Parsons:

Q. Was that subject discussed between you and your wife, Mary?

A. It was.

Q. And was the subject of whether or not she desired to [fol. 2075] take out life insurance discussed with her?

Mr. Williams: That is objected to as being leading, putting the answer of what was said in the witness's mouth.

The Court: I think so. It would be an indirect method of getting hearsay testimony into the record. Objection sustained.

Mr. Parsons: How long after this discussion of insurance with your wife, Mary, upon the first occasion was it discussed again?

A. It was discussed every few days until she got the insurance.

Q. And when the insurance was finally procured who made the arrangements for the procuring and the obtaining of the policy, you or Mrs. James?

A. Well, I don't know if I just understand that right.

Q. Well, who carried on the discussion, I will put it a little plainer, who carried on the discussions with the life insurance agent with reference to obtaining the insurance upon her life?

A. She and I both.

Q. And when the insurance was obtained who paid for it?

A. She paid for the insurance.

Q. And did you ever have any discussion with Mr. Galatz pertaining to the insurance after the death of your wife?

A. I did.

Q. And where was that?

[fol. 2076] A. At the barber shop.

Q. At about when was that?

A. You said after her death?

Q. Yes.

A. Well, it was, I think, two or three weeks after her death.

Q. And what was that discussion?

A. Well, he came up to the barber shop to collect my insurance on the policies I had taken out with him, and I talked with him about the claim that I had against the company and he said that—I told him that the company had started action against me to rescind the policy.

Q. Was that a fact? Had the company done that?

A. It had. And he said that if the company didn't pay that claim that he would resign. He would not write insurance for a company that would not pay, and he insisted that I pay the premium on the policies that I was holding with the company. I told him "No", that I would not pay the premiums with a company that would not pay the insur-

ance, and I refused to pay. He said "It would be a good thing for you and your law suit if you would keep the premiums up until after your law suit was over." I told him I was going to sue the company and I told him I would not pay it anyway, and then I did not see him again for two or three weeks.

Q. And did you see him upon an occasion two or three weeks thereafter?

[fol. 2077] A. I did.

Q. Did you have a discussion with him then with reference to the payment of the life insurance upon the life of your wife, Mary, your deceased wife, then?

A. I did.

Q. And where was that discussion?

A. He was in my barber shop getting a haircut and I told him that I had started action against the company or was going to, and he said, "The company does not believe that you are going to sue them for that insurance." I said, "Why don't the company believe that I am going to sue them for that insurance?" And he said, "Of course, the Coroner's jury didn't completely exonerate you of your wife's death and consequently feels there should be a murder charge against you if you do that." I said, "I am going to sue them, and I will do it if they break my neck", which I did, sue the company.

Q. And subsequently—strike that. Referring now to the 5th day of August, 1935, Monday, August 5th, when was the last time upon that date that you saw your wife alive?

A. Well, I went to work that morning.

Q. And about what time of the day was that?

A. It was somewhere maybe quarter of 7:00 or 7:00 o'clock.

Q. In the morning?

A. Yes sir, in the morning.

Q. And what was her condition at that time?

[fol. 2078] A. Well, she was very nauseated at that time. She had been very restless through the night. She had been up several times and she was so nauseated that I wouldn't cook any breakfast. So I quit eating breakfast at home and when I started to leave she was sitting up in the bed and I went in and told her, "If I was you I would sleep awhile because you have been very restless all night." I was not sleeping in the bedroom with her because she had been so restless I couldn't sleep with her. Whenever she

would turn on the light and go to the bathroom, naturally she would wake me up and I insisted that she sleep alone. And she said that she would get up, that she felt as bad in bed as if she was up."

Q. So it was about 10 o'clock in the morning when you last saw her alive, is that right?

A. That is right.

Q. Now, when did you next see her at all?

A. I saw her next when I went home that night about 8 o'clock.

Q. And when you arrived at home who was with you, if anybody?

A. Mr. Pemberton and Viola Lueck.

Q. And you arrived home about 8 o'clock?

A. We did.

Q. And where did you folks go, if any place, when you reached home?

[fol. 2079] A. Well, when we reached home it was always my habit—the garage was right back of the driveway—and I always drove my car into the garage and parked it there for the night, and went into the house through the back door. We all drove in the garage and parked the car and got the steaks that were in the car and entered the house through the back door.

Q. Now, what did you do after you entered the house?

A. Well, of course, the house was dark and my wife knew they were staying there for dinner and naturally I thought she had gone to sleep. I had found her asleep on other evenings with the light off and I had asked her not to do that because it frightened me, but that night I thought she was asleep.

We went from one room in the house to the other and I didn't find her. And sometimes she would go to sleep on the front porch so we opened the door and went out there and she wasn't there. Of course, we became very alarmed about it and naturally, I felt maybe that—she had fainted several times and I thought maybe she had fainted around the chicken house in some way, and we got two flashlights and Mr. Pemberton and I went out the back door and I went up to the hen house and looked for her and he found her on the side of the house in the fish pond.

Q. Did you hear him cry out?

A. Yes, he cried out about the time I reached the kitchen. [fol. 2080] Q. Did you come back to his direction?

A. Yes, he met me by the back of the house.

Q. Did you have some conversation with him?

A. Well, he was all excited and I could tell by his voice that something had happened and when I got to him he told me, "Brace up. Your wife is gone." I could see her from my flashlight and he tried to keep me from going to her, but I went to her anyhow.

Q. Now, where did you find her body? Previous to this—Just look at Exhibit 1, and particularly the fish pond and can you indicate to the jury where her body was found?

A. Well, I do not know as I could just exactly say where her body was found, whether that would be true or not, because I was so excited that I didn't pay any attention, but it was somewhere along that side.

Q. Somewhere along this side?

A. Yes, sir.

Mr. Williams: Indicating the east side.

Mr. Parsons: I will fix it. If I do not, you call me down.

Q. And you have indicated from about the point that is on the east side of the fish pond to the figure marked "2" here in blue, is that right?

A. I would think it was right in there.

Q. So that it was along the east side of the pond between this point 86 and the point 2, is that right?

A. Yes.

[fol. 2081] Q. And was she dead then apparently?

A. Yes, she was dead, because I put my arms around her and I tried two or three times to lift her out of the water and I liked to fall in the water with her.

Q. And you had been near her at the fish pond before that day, had you? That particular day you had been there?

A. Well, I hadn't been home since morning.

Q. Now, what time did you arrive at work that morning?

A. I think I arrived at work somewhere between 8:00 and 9:00 o'clock.

Q. And were you at the shop for any considerable time during that day?

A. I was out long enough to get my lunch.

Q. About how long was that?

A. I never stayed over 30 minutes.

Q. And would you say that was probably true upon that day?

A. Yes, sir.

Q. Now, what time did you leave your establishment on the previous Saturday night, August the 3rd?

A. Well, I don't remember just the minute I left there, but I closed my barber shop at 7 o'clock that night and what patrons were in there, we take care of, and we don't let any more in, and then after we get through with them, it is my business to check up the week's wages and pay the labor and sometimes it is 7:30 or 8:00 when I get out every [fol. 2082] night.

Q. And on that particular Saturday night would you say it was approximately 7:30 or 8:00 o'clock when you left the establishment?

A. I would.

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[fol. 2083] ROBERT S. JAMES, resumed the stand and testified as follows:

Direct examination (Continued).

By Mr. Parsons:

Q. Now, Mr. James, on Saturday August 3rd, did you see Mr. Hope upon that date at all?

A. I did.

Q. And at about what time did you see him on Saturday, August 3rd?

A. Well, I don't know just what time of day it was. Saturday is an awful busy day for me.

Q. Well, your best judgment now.

A. I think it was maybe around 10 or 11 o'clock in the morning.

Q. Did you have some conversation with him at that time?

A. I did.

Q. And where was that conversation?

A. In the barber shop.

Q. And what was said between you?

A. Well, he came in and said he had been working at Long Beach. I hadn't seen him for some little time and he said that he lost his job down there and he wanted to go down

[fol. 2084] for his pay check, and he might have a lot of running around to do down there and he asked me if he could use my car and I let him have my car to go down Saturday afternoon. And while he was gone he filed a prescription for me for my wife and I think about 5:30 he brought my car back and brought the keys to the barber shop. I didn't go out of the shop.

Q. Now, when did you see him again after that Saturday night? Did you see him until the following day, Sunday?

A. I saw him the next day about 11 o'clock.

Q. Where did you see Mr. Hope on Sunday?

A. He came to my house.

Q. And did you have some conversation with him then?

A. I did.

Q. And what was that conversation?

A. Well, he told me what he had come up there for, and in fact he told me the day before that he was coming and what he was coming for.

Q. What did he say?

A. He said he had made arrangements with my wife to perform an operation on her.

Q. And what had he said along that line? What was the sum and substance of it?

A. Well, that was the biggest part of it.

Q. And what did you say to him when he told you that?

A. Well, I told him that she told me about it Friday night and I begged her not to do it and I knew she was in a [fol. 2085] very delicate condition and I didn't want her to go through with it and I wanted her to go to the hospital because I was paying a hospital tuition where it wouldn't cost me anything. And she said, "I won't be played."

Mr. Williams: Now, just a minute; we are apparently getting into a conversation with his wife.

By Mr. Parsons:

Q. Did you discuss that subject with your wife? The subject about her having something done about the fact that she was in a family way?

Mr. Williams: That is objected to as hearsay.

The Court: Sustained.

By Mr. Parsons:

Q. Well, was that subject discussed?

Mr. Williams: The same objection.

The Court: Same ruling.

By Mr. Parsons:

Q. Now, with reference to this matter, this discussion which you had with Mr. Hope, did you have a further discussion with him upon that subject on Sunday?

A. Yes, he came to the house Sunday morning.

Q. And what was said then?

A. Well, he told me what he had come for and I told him that I knew about it and I didn't want him to tell me anything about it, that it was against my wishes. And I had left my money in the cash drawer the night before and I got in my car and drove down to the shop and got my money and came back to the house by 1 o'clock and Mr. Hope stayed there with my wife and took care of her while I was gone.

[fol. 2086] Q. What time did Hope leave on Sunday?

A. He left my house about 1 o'clock.

Q. And did you make any arrangements with him about the use of your automobile?

A. He said he would return it that night, but he didn't return it until 6:30 Monday morning.

Q. And from Sunday approximately 1 o'clock in the afternoon until 6:30 Monday morning, did you see Mr. Hope at all?

A. I did not.

Q. And when he returned with the car Monday morning, did you have any conversation with him with reference to his delay in returning the car?

A. We had quite an argument about him keeping the car all night and keeping me worried about it.

Q. When you left Monday morning, left your home to go to work, where was Mr. Hope at that time, if you know?

A. Mr. Hope was at my house when I left for work.

Q. And is that the last time you saw him that day?

A. That was the last time I saw him that day.

Q. Had you had any previous plans for a dinner engagement on Monday night?

A. I did.

Q. And with whom had those arrangements been made for dinner?

A. Mr. and Mrs. Pemberton.

[fol. 2087] Q. And when were those arrangements made, approximately?

A. They visited us Wednesday—Thursday night, before my wife's death Monday, and they made an appointment with my wife to have dinner with them at their apartment Monday night, and Monday morning when I started to work my wife was ill, and she didn't feel like going to town. She had planned to have her hair fixed that day, and stay over there until noon and have dinner with them, so she asked me to 'phone Mrs. Pemberton and tell her that she was not able to come to town, and for them to come out to the house, and I did, and met them, and they went home with me.

Q. Now, did your wife have any money? Had you given her any cash at about this time?

A. I gave her \$100.00 Saturday morning.

Q. Did you ever give Mr. Hope \$100.00?

A. The most money Mr. Hope ever got off of me in one sum was \$5.00.

Q. Did you ever slip your hand under an apron in the barber shop, and slip him \$100.00, and tell him not to try to give it back to you?

A. No.

Q. Now, referring to another subject, Mr. James, and I might state I am picking up a lot of loose ends. There is so much territory. I hope your Honor doesn't think perhaps my mind appears to be muddled, but there are a lot of various subjects that only one or two questions can be [fol. 2088] directed to. With reference to how you were dressed at Pike's Peak, Mr. James, will you tell us how you were dressed upon the occasion of this accident?

A. Well, I had on an old brown suit of clothes that I use around the house, around my chicken pens, and places, that I never wore any other time, and I had some old shoes that I always kept around the house, because I didn't wear my good shoes out around the chicken pen.

Q. Did you ever tell in substance, or effect, this Mr. Dunnington who was here and testified, that you had on a new pair of shoes up Pike's Peak?

A. No.

Q. Did you ever have any discussion with Mr. Dunning-

ton about how it came that your shoes had been untarnished in your walk down Pike's Peak?

A. He never mentioned to me about any shoes.

Q. You and Mr. Dunnington had had some words, had you not?

A. Yes, we are not on friendly terms.

Q. And he is a business competitor of yours in that neighborhood?

A. Yes, when I got hurt on Pike's Peak I sold him my barber shop, and when I came back—that was in 1932—and when I came back in 1934 I put in a barber shop within a block from him, and since then he has been my bitter enemy, because he thought that I should not put in the [fol. 2089] barber shop there, because I had taken a lot of business away from him there.

Q. Now, with reference to your insurance, and the application for the payment of money in connection with your wife's, Winona's, death, did you have some conversation with Mr. Pries, an insurance man, who was here?

A. I did.

Q. And where was that conversation held?

A. The first conversation was held in the lobby of the Trinity Hotel shortly after I arrived back here from burying my wife.

Q. And were you at that time having some difficulty in getting the papers ready to present to the company?

A. I wasn't have any difficulty. I just decided to make the papers out, and I met him, and he said he would make them out for me, because he knew how to make them out so that there would not be any delay.

Q. And what did you and he do with reference to preparing the papers, the application for the payment on the policy?

A. We went in the lobby and sat down to a table, and I got him the death certificate, and then I noticed that on the death certificate, while he was making out the papers, that it said that my wife's death was caused by drowning. He asked me about it, and I told him I didn't know anything about it, and that is the way the Coroner got it out in [fol. 2090] Colorado Springs. He said, "I will write the Coroner and see if he will put the contributing cause on the certificate," and he did, and we got an answer a few days later—he came out to my mother-in-law's house, and I was there, and my wife's father and sister were there,

and my father-in-law dictated the letter to my sister-in-law, and she wrote the letter back to Dr. Gilmore.

Q. Now, at that time did you suggest any of the matters that should go into the letter, or did he dictate the letter?

A. Mr. Pries dictated the entire letter. I don't know anything about what he was dictating.

Q. And how much education have you had in school, Mr. James?

A. Well, I went to school very little in my life.

Q. Is it with some difficulty that you write letters?

A. Well, I write such bad handwriting that I am ashamed to write, and I have always insisted on some one writing a letter for me.

Q. Do you know about how long you went to a classroom in school? Do you recall that?

A. Less than six months in all my life.

Q. And what knowledge you have has been from your experience in living, and what you have learned in a business way?

A. Correct.

Q. Now, Mr. James, you have testified here that you had [fol. 2091] a hernia. Did you ever have a hernia prior to the time that you were interrogated by the District Attorney's investigators for some two days out on La Salle Avenue?

A. No.

Q. Now, did you ever have any indication of this hernia, prior to the time that you were kept out there at the house?

A. I have never had any trouble with my side at all. A few years ago the Doctor told me I had an attack of appendicitis, but I never had any developments from that.

Q. Did you ever have any pain or swelling about the abdominal region, prior to the time that you were out there with the District Attorney's investigators?

A. Not that I remember.

Q. Now, do you know Mr. McKelvey who testified here?

A. I do.

Q. And he is the gentleman, I believe, that testified that you purchased a Pierce Arrow automobile from him?

A. That is right.

Q. Did you ever in substance or effect tell him that the accident in Colorado was caused by the breaking of a steering knuckle?

A. I don't remember ever talking to him about my accident there.

Q. Did you purchase an automobile from him?

A. Yes, I bought a Pierce Arrow coupe from him, a second-hand automobile.

[fol. 2092] Q. And is that the only discussion you ever had with him?

A. To my knowledge it is.

Q. Now, you knew Miss Yarnell here, did you not, who came over here from Colorado Springs to testify against you?

A. I did.

Q. And was she some relation to your wife, Winona?

A. She was a cousin to her.

Q. And during the time that you were at Colorado Springs did you see her?

A. I saw her most every day.

Q. And did you upon any occasion ever kiss her?

A. Many times.

Q. And did you ever attempt to make a date with her, or make love to her in the usual fashion, or any other way?

A. I did not. The only time I ever kissed her was right around the hospital where my wife would be there.

Q. Did you ever kiss her except as a friendly act?

A. Never did. She used to kiss me, and tease my wife about it.

Q. When you left Colorado Springs, upon the depot platform in public view, what did you do with reference to kissing her?

A. She kissed me goodbye the day I left her.

Q. And at that time did you have some conversation with her about the many kindnesses she had extended to you while you were there in this difficulty?

[fols. 2093-2103] A. Yes, I told her how much I appreciated it, and how much I appreciated her automobile, and the kindness of her family, and I gave her \$20.00 and told her it was for the use of her car, and the gasoline I had used.

Q. And had she, during the time you were at Colorado Springs, taken you about the city?

A. Yes, she took me to the hospital from the hotel nearly every night.

Q. Now, where was the hospital located with reference

to the central part of Colorado Springs, or the portion where you were stopping, staying?

A. Well, it was quite a ways out from town. It was very inconvenient to get in and out there. I don't think there was a bus line out there, and that is why I used her car so much.

[fols. 2104-2109] Robert S. James resumes stand.

Direct examination (Continued).

[fol. 2110] Q. Now, during the time that your wife, Mary, was sick, this illness prior to her death, did she have any fainting or dizzy spells?

A. Yes, she had many of those.

Q. And was she from time to time treated by a doctor?

A. Well, I had the doctor once or twice; I don't just remember, out to the house.

Q. Now, how was your wife, Mary, dressed the night that you found her in the fish pond?

A. She had on yellow-flowered pajamas.

Q. And did she ever have a night gown in the house?

A. If she did, I didn't know anything about it. She [fol. 2111] always slept in pajamas.

Q. And how was your wife dressed on the morning of August 5th, when you last saw her alive?

A. The morning I left and saw her alive she had on, it was a kind of a two-toned pajamas, kind of a rose and a copper color, made by the Real Silk Hosiery people. I don't know just what color you would call them, but she had slept in them that night.

Q. Did your wife have a pair of rose colored pajamas with a smock.

A. Those are the ones I mean. They are kind of rose colored, and the top are kind of a brown, copper color.

Q. Did you have some conversation with your wife, Mary, before you left home on the morning of August 5th?

A. I did.

Q. And was Hope present?

A. He was.

Q. What was that conversation?

A. Well, after he and I argued about my car, we went into the house, and he asked me how my wife was. I told him she wanted to see him, and he went into the room to talk to her, and she told him that she hadn't started to menstruate, and he said that he would take care of that, and for me to go on to work, and that he would probably spend the day there, but he didn't spend the day. He called me by 'phone during the day and told *he* he had to come to town.

[fol. 2112] Q. Now, when you returned home with the Pembertons on the night of August 5th, was there a letter there in the house? Did you sometime during the evening see a letter in the house written in your wife's handwriting?

A. I didn't see the letter. I think Miss Lueck found the letter, but I didn't see it that night.

Q. When were you first shown the letter?

A. I never was shown the letter until sitting there at the table. I had seen it printed in the newspaper.

Q. Did you ever cause your wife to write such a letter?

A. I did not.

Q. And did you know that she had written such a letter? Until you were advised of it?

A. I didn't know anything about the letter until Miss Lueck said something about it.

Q. Now, did you have some conversation with the officers about the letter your wife had written?

A. I did.

Q. And when was that conversation?

A. It was in the District Attorney's office the night that I made the statement.

Q. And what was that conversation? Who was present, if you recall?

A. Mr. Southard and I. He told me to tell him the statement that I made my wife very drunk and insisted that she write that letter, and that I had dictated it.

[fol. 2113] Q. And what did you say?

A. I told him I would tell it.

Q. And did you ever at any time, on either August 4th or August 5th, give your wife any whiskey?

A. No, I never gave her any whiskey. She couldn't drink any whiskey. There was plenty of it at the house if she wanted it.

Q. Was there whiskey in the house?

A. Several quarts there that people had brought up to give us a drink out of, and I would insist that she would not drink whiskey. That was before she got sick, because it never did agree with her.

Q. Now, did you have some dogs about your premises?

A. I had three bull dogs while I was there.

Q. Did you keep those about the premises at night?

A. I kept them shut up in the garage of a night, so that they wouldn't disturb people barking of a morning before I got up, and during the day I kept them in my chicken pen, to protect my chickens while I was away.

Q. Now, during the time that your wife and you lived at 1329 Verdugo Road, did she do any work about the yard and the chicken coops, attending to the chickens?

A. Well, while she was working in the beauty shop with me I took care of the chickens, and took care of the housework, but after she was ill I wasn't doing very good with my chickens, and she told me I didn't know how to raise [fol. 2114] little chickens, and she took over the work of raising the baby chickens, and also watering the lawn.

Q. Now, did you—pardon me just a moment. Did you know Mr. Taggart, who worked for Mr. Hoffman, Mr. James?

A. Yes, I remember seeing him at the automobile company.

Q. And were you down there looking at the automobiles?

A. Yes.

* * * * *

[fol. 2115] Q. Now, prior to the death of your wife, Mary, had you ever had any discussion with her with reference to a cut upon her foot?

A. I had.

Q. And did she at that time have a cut upon her foot?

A. She did.

[fol. 2116] Q. Do you know how she came by the cut on her foot?

A. She told me she went barefooted around the house because she had some bad corns, and she cut her foot out in the yard, she told me on a tin can.

Q. Now, was she in the habit of going about the yard without any sandals or anything that way, from time to time?

A. Practically all the time she lived there, I mean while she was very ill, she went barefooted.

Q. Now, do you know whether or not that cut was upon the toe or where it was upon the foot?

A. She told me she cut her toe.

Q. Did you ever pay any particular attention to it?

A. I did not because at night she had her shoes on and I paid no attention to it.

Q. Now, what was your wife's condition prior to her death with reference to sleeplessness?

A. Well, she had been very restless practically all the time.

Q. And had the doctor prescribed anything for her sleeplessness or had any medicine been used by her?

A. Yes, sir.

Q. Who was the doctor?

A. Dr. George.

Q. Now, while you were in Colorado, did you receive any money from Mr. Dunnington, the barber?

A. I did.

[fol. 2117] Q. And what were the circumstances under which you received that money?

A. Well, when I started on my vacation, a short time before that Mr. Dunnington had been working for me and he was out of work and I asked him if he would work five or six weeks for me while I was on my vacation, and I made him the manager of the barber shop while I was gone, and what money was coming from the barber shop, he should keep it in the bank, and after I had my accident, I wrote him to send me \$100.00 at the time, which he did. When I came back to town I checked up with him and I still had some money coming.

Q. Was that money in any way out of his pocket to you?

A. No, was not out of his pocket to me, but out of the receipts from my business.

Q. Now, some time later, or about that time, you sold the shop to him, did you not?

A. Well, after I returned and buried my wife, I stayed there and I was nervous and I couldn't go to work. I was sick. I sold him the barber shop for \$1,000.00. I don't remember the date I sold it to him, but it was between October the 14th and Christmas.

Q. And did you then go to Alabama?

A. No, I hadn't gone to Alabama. I had taken me an

apartment out here away from everybody where I could be left alone. I didn't want to see anybody, and nobody but the landlady knew who I was and my friends knew where I [fols. 2118-2120] was. On January the 4th I received a telegram from my sister that my mother had passed away and I left that night for Birmingham.

Q. And did you borrow any money on the Kansas City Life Insurance policy?

A. We borrowed, I think, \$150.00 on the Kansas City Life Insurance Company policy the day we left on our vacation.

Q. Whose policy was that?

A. My wife's policy.

Q. Now, the insurance on your wife, Winona, was how much, approximately?

A. Do you mean altogether?

Q. Yes.

A. Altogether she had three policies. She had a policy for \$1,000.00 and one for \$5,000.00 and one for \$3,000.00.

Q. And that was paid, was it?

A. Yes, it was paid about a year or so afterwards.

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[fol. 2121-2123] Q. Now, at the time you were in Colorado, Mr. James?

* * * * *

[fol. 2124] A. Miss Yarnell wrote, I think, every letter for me that I wrote myself while I was there; I dictated it.

Q. Now, you were taken after your arrest, were you not, Mr. James, to a snake pit down at Ocean Park?

A. I was.

Q. And who was present, if you recall?

A. Do you mean the officers?

Q. Yes. As near as you can remember?

A. Well, there was four or five officers with me in one car and there was four or five with Hope in another car. They took us to the snake pit.

[fol. 2125] Q. Did you see Mr. Allman there?

A. That is the little black-haired man?

Q. The man who testified here.

A. Yes.

Q. Mike Allman, I think they call him.

A. Yes.

Q. What was said and done there in your presence?

A. They took us in the show and paraded us around on one side of the pit, and Mr. Griffen called him out of the pit, and he come up there, and he said, "Here is two fellows I have got here." He said, "Do you know these two men?", and he pointed to Hope, and he said, "I know that man, but this one I don't know him. I don't think I have ever seen him."

Q. Was anything further said upon that matter?

A. Yes. Griffen went ahead to tell him that we were the men that came down there and bought the rattlesnakes from him, and asked him to identify me again. He said, "I can identify this man, but," he said, "that man, I couldn't swear to his identification."

Q. When he referred to "that man", whom did he refer to?

A. He referred to me.

Q. Now, did you have any conversation with Mr. Allman there with reference to your identity?

A. I did.

Q. What did you say, and what did he say?

[fol. 2126] A. I told him that they were trying to connect me with a crime. I said, "If you are not positive of my identification, don't you tell the officers that you have seen me here.", so he said, "I wouldn't swear that I have seen you here."

Q. When you had this conversation in the District Attorney's office on the night of May 2nd, was there anything said about the fact your statement would be used against you?

A. I didn't know whether the statement would be used against me, or not. I would rather die than to have gone back to that house and went through torture like the three days I was out there. I didn't care whether the statement was taken, or not.

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By Mr. Williams:

Q. Mr. James, I believe you stated you were very fond of your wife?

[fol. 2127] A. Very much.

Q. And when you discovered her dead body in the fish pond on the night of August 5th, 1935, you knew at that time that she and Hope had been discussing the matter of the commission of an operation by Hope on her, did you?

A. I did.

Q. And Hope had told you that morning that he intended to do something to do away with her pregnancy?

A. He did.

Q. Did you believe, then, when you saw her dead body there that she had died as the result of an operation performed, or attempted to be performed by Hope on her?

A. No.

Q. You didn't believe that?

A. No.

Q. You didn't believe that Hope had anything whatsoever to do with her death?

A. I didn't think so.

Q. Now, I believe you said that she had fainted several times during her pregnancy?

A. She had.

Q. And had she fainted in your presence?

A. Yes, sir.

Q. And had she also reported to you that she had fainted outside of your presence?

A. I don't know whether she did that, or not, but I have [fol. 2128] seen her faint when she was cooking around the house.

Q. In other words, you had seen her faint on more than one occasion, had you?

A. Yes.

Q. How many times would you say that she had fainted, to your knowledge, prior to her death?

A. I saw her faint two or three times, and I saw her get so sick many times that she had to go fall across the bed.

Q. And did that fainting impress itself upon your mind?

A. What do you mean by that?

Q. I mean did you regard it seriously, something that you thought about and worried about?

A. I only regarded it at the time she would be cooking. She didn't seem to have those sick spells any other time.

Q. The fainting was something which impressed itself upon your mind and your memory, was it?

A. Oh, yes.

Q. Now Mr. James, do you remember having testified in the United States District Court, before the Honorable Leon R. Yankwich, in the case of Robert S. James against the Mutual Life Insurance Company of New York, wherein you testified on March 31st, 1936?

A. I do.

Q. And did you at that time, in response to the following questions, make the following answers:

Mr. Parsons: Just a minute. I submit if he is reading [fol. 2129] from a written transcript, which it now appears that he is, he should show the transcript to the witness.

Mr. Barnes: We are not reading from a written transcript, we are reading from notes.

The Court: Well, in any event the requirement that the transcript should be shown to the witness would only be under the general law. The objection will be overruled.

Mr. Williams: (Reading): "Q.—Do you remember you took your sister and your wife to the Lion Farm, and your wife fainted? A.—I remember going to the Lion Farm, but my wife didn't faint. Q.—She didn't? A.—No. Q.—Didn't she faint about that time? A.—No. I never knew her to faint in my life."

Q. Did you so state?
[fol. 2130] A. I might have stated it that way, but I was meaning before her pregnancy. I admitted several times after—

Q. Did you admit you made the remark "No, I never before in my life"?

A. I may have said it.

Q. Well, did you or did you not?

Mr. Parsons: He has answered.

The Court: He said, "I may have", which is not an answer. In other words, Mr. James, if you recall, you ought to be able to state whether you did or did not say that.

A. Well, they asked me many questions—

Q. Just a minute; did you say it or didn't you say it? You- answer should be to one of three questions, did you or did you not or do you remember?

A. I don't remember.

By Mr. Williams:

Q. Now, you have told us that your financial condition at the time during August, 1935 was very good, and you

didn't owe any money and you had \$400.00 or \$500.00 in the bank, is that correct?

A. Approximately that.

Q. And was that true on the day that your wife's body was found—namely that you had approximately \$400.00 or \$500.00 in the bank and didn't owe any money to anybody?

A. I don't know of any money that I owed to anybody, but I don't think I had that much money in the bank at that time.

Q. How much money did you have in the bank?

[fol. 2131] A. Well, I don't know what money I had in the bank. Lois Wright had it in the bank in her name, I didn't carry a bank account myself.

Q. You kept all your money in Lois Wright's name?

A. Yes, sir.

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[fol. 2132] By Mr. Williams:

Q. Isn't it a fact that the reason that you had your money in Lois Wright's name is because you owed a judgment of about \$5,000.00 which you didn't desire to pay?

A. There is a judgment in Alabama against me, yes.

Q. For the sum of about \$5,000.00?

A. I think so.

Q. Now, will you state whether at the time of your wife's death you had any money of any kind, either personal or in Lois Wright's name in the bank?

A. I had none personally; I don't know how much I had in the bank in Lois Wright's name.

Q. What did you mean by your testimony that you gave yesterday that you had four or five hundred dollars in the bank?

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[fol. 2133] A. Well, what I meant by that I felt at the time that maybe I had a couple of hundred dollars in the bank in Lois' name and I think my wife had some money at home and I always had a couple of hundred dollars in my pockets and around my business.

Q. When you were testifying yesterday then you meant to convey the idea that in some way or another, whether what your wife had about the house or what Lois had in your

name or otherwise, that you did have four or five hundred dollars?

A. That is what I meant.

Q. At the time of your wife's death?

[fol. 2134] A. Yes.

Q. Now, you stated yesterday that you gave your wife \$100.00 on the Saturday preceding her death. Did you know at the time you gave that \$100.00 to her that she had two or three hundred dollars around the house some place?

A. No.

Q. When did you reach the conclusion that she had two or three hundred dollars around the house some place?

A. I never reached the conclusion that she had two or three hundred dollars.

Q. What did you mean when you said a few moments ago that your wife usually did have two or three hundred dollars around the house?

A. I think you misunderstood me.

Mr. Silverman: I think the Court will permit you to explain that, Mr. James.

The Court: Yes, you may explain it if you want to.

A. I said around my business, and what money I had around the house what Lois had that I probably thought I had four or five hundred dollars.

Q. And did you at that time, in August of 1935, believe that you had about four or five hundred dollars at the time of your wife's death?

A. With the money of the business and so forth, sure.

Q. Now, Mr. James, on the 7th day of August, 1935, at the premises of number 1329 Verdugo Road in the presence [fol. 2135] of Deputy Sheriffs Virgil Gray and Willard Killion and E. F. Lynch, statement reporter from the Sheriff's office, that is to say two days after your wife's death, did you not in response to the following questions give the following answers: "Q—What is your financial condition, Mr. James? A—My financial conditions? I don't have any money at all. I just have about what I earn is all. Q—Have you any bank account? A—No. Q—When is the last time you had any money in the bank? A—The last time I had was when I equipped my beauty shop for Mary when she came over to work and we decided to get married. I equipped that beauty shop at the barber shop. I had been

sub-letting, and they furnished it so I equipped that, and I spent over a thousand dollars in that. Q—How long ago was that? A—I believe it was in March. Q—And at that time you used up all the surplus money you had? A—Well, I didn't use it all, I guess I had six or seven hundred dollars left. I bought Mary's engagement ring, a wedding ring, diamond. They cost me quite a little bit of money. Q—How much? A—Let's see. The wedding ring I think this insurance agent I was telling you about being a customer and friend of mine for a long time said he could get the wedding ring for half price. I believe it was eighty some dollars. Q—What did the engagement ring cost? A—Well, the setting cost me sixty some odd dollars and I had a pretty good size stone put in myself and then there was some—there was some smaller stones that cost about \$3.00 apiece. [fol. 2136] A—She didn't have that on the time she fell in the pond? A—No, the girl found them back in the dresser drawer. I put them in my pocket. I was afraid somebody would pick them up. Q—What became of the balance of the six or seven hundred dollars? A—Well, I have spent it here and there. I don't know, my sister came out to see us, and I paid, I practically paid her way. I don't know, it seemed like I owed some little bills around that I cleaned up. I practically spent it all. Q—At the present time you haven't any bank account? A—No. Q—What bank did you do business with? A—I didn't do business with any bank."

Did you so answer in response to those questions?

A. I probably did.

Q. Well, would you say that you did or didn't?

A. To the best of my recollection I answer the questions that I could remember.

Q. Well, is there any one of those answers that I read to you that you would say that you didn't give?

A. Well, I wouldn't say that there were any that I didn't give.

Q. Now, when you married Winona, what was her business?

A. The last work that Winona had done, to my knowledge, was a bookkeeper at the Howard Automobile Company.

Q. She was not engaged in the beauty parlor before that?

A. No.

Q. And Mary was in the beauty parlor with you?

[fol. 2137] A. Yes.

Q. And you paid her a salary of \$20.00 a week, did you not?

A. Yes.

Q. Her income then was \$20.00 a week?

A. Her income when she was working, \$25.00 or better.

Q. Now, when you had this conversation at which Mr. Hope was present, when you had breakfast together, that you have told us about, had you already ascertained at that time that Mary was pregnant?

A. Well, from what she had told me I began to think she was.

Q. Had you had her examined by a doctor at that time to determine whether she was pregnant?

A. No, I don't think so.

Q. So that neither you nor she, at that time, were certain that she was pregnant?

A. No, we had no way of being certain.

Q. And you introduced Mr. Hope as Doctor Smith, didn't you?

A. I did.

Q. And how did you come to introduce him as Doctor Smith?

A. He asked me to.

Q. And that is the only reason you did that?

A. Well, he has always told me that he spent all of his life studying medicine and fooling with dope.

[fol. 2138] Q. And did you believe that at that time?

A. Well, I had no right to disbelieve it.

Q. Well, did you believe it? Just answer that "yes" or "no". You either did or didn't believe it.

A. Well, I would say, well, I didn't have much faith in what he told me.

Q. Did you believe he was a doctor when you introduced him as a doctor?

A. I believed he had been.

Q. Did you believe that his name was Smith?

A. No, I didn't believe that his name was Smith.

Q. But you told your wife that his name was Smith?

A. Yes, sir.

Q. And you told your sister that his name was Smith?

A. Yes, sir.

Q. Why did you tell your sister that his name was Smith?

A. At his request.

Q. And for that reason only?

A. That is the only reason I can think of right now.

Q. Had your wife ever met him before?

A. Well, I don't know whether she had or not.

Q. To your knowledge had she ever met him before?

A. I don't know. She may have seen him in the shop.

Q. Had you ever introduced him before?

A. I don't remember.

[fol. 2139] Q. Now, as I understood your testimony you, on Sunday morning, the 4th of August, went down to the barber shop and got the money that you had had at the barber shop?

A. Yes.

Q. And you drove down in your own car, didn't you?

A. Yes.

Q. Did you go by yourself?

A. Yes, sir.

Q. And while you were gone, Hope and your wife remained at the house?

A. Yes, sir.

Q. And you got back about 1:00 o'clock?

A. I think it was about 1:00 o'clock.

Q. And then you loaned your car to Hope and he went away with the car?

A. He did.

Q. And he didn't return until 6:30 the next morning?

A. That is right.

Q. So that left you without any automobile during the entire afternoon?

A. That is right.

Q. Now, did you and your wife remain at home all afternoon?

A. Not all afternoon.

Q. Where did you go?

A. We walked up the street a ways, and had a sandwich.

[fol. 2140] Q. What time was that?

A. I think we left home about 4:00 o'clock.

Q. What time did you get back?

A. Well, I don't know. We stopped by a school house and had a sandwich. I imagine it was about an hour and a half.

Q. And you say you got back about 5:30?

A. I imagine it was that time of the day.

Q. And your wife walked that distance?

A. That is correct.

Q. That was how great a distance?

A. Oh, about quarter of a mile.

Q. That was in about the neighborhood of La Canada?

A. Yes, sir, about in that neighborhood, or Montrose.

Q. You didn't go outside of Montrose?

A. No, sir.

Q. And you didn't go out of La Canada?

A. No, sir.

Q. Did you leave the place except on that one walk you took?

A. No, sir.

Q. You didn't go riding in the automobile?

A. No, sir.

Q. You are definite about that?

A. I am definite about it.

Q. Well, now, I will ask you whether on the 7th of August, at about 1:45 in the afternoon, at 1329 Verdugo [fol. 2141] Road, in the presence of Deputy Sheriff Virgil Gray, Willard Killian, and Court Reporter Lynch, this being on the 7th of August, 1935, two days after your wife's death was discovered, if you didn't at that time say in response to questions asked by Mr. Killian, as follows: "You were home all day Sunday? A.—Well, practically all day only we just took a little drive along in the afternoon. Q.—Where did you go? A.—Around through Flintridge, and coming back by Glendale." Did you so state in response to those questions?

A. I probably did.

Q. Now, later on in that same conversation, a half hour or an hour later, did Mr. Killian ask you the following questions, and did you give the following answers: "Sunday afternoon after you came back from the ride, you were in the house, or on the front porch, or where? A.—We came back after the ride—I fed my dogs and my chickens, and I was kind of tired, and I went to bed just about dark, I think." Did you so state in response to that question?

A. I probably did.

Q. Well, did you? Is it your best recollection that you did so state?

A. I was almost crazy at the time he was threatening me, and I wouldn't be positive of any of that stuff.

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[fol. 2142] Q. Now, Mr. James, when this automobile accident occurred up on Pike's Peak, I wish you would tell us just exactly in detail exactly what happened as you now remember it?

[fol. 2143] A. I told you yesterday just what happened. Tell it over?

Q. Well, just state it to me now, in a little more detail. I want to know exactly what happened, the entire detail of it.

A. From the time the car went off?

Q. Yes.

A. As I told you, I was riding on the right-hand side of the car looking through the window with some field-glasses, and I never noticed the car being off the road until it made the lunge off the bank, and as the car rolled down the mountain I practically didn't know what was happening. When I woke up I was laying to the right of the car about 25 feet from it. My wife was lying on the floor with her feet in around the gear shift. Her head was lying out across the running board on the rocks.

Q. What did you do then?

A. When I got up naturally I went to the car, and she was groaning. I picked her up in my arms, and I asked her how bad she was hurt, and she said, "Get a doctor for me." So I was afraid to leave her on the ground. I tried to put her in the car. I raised her up, and tried to get her up in the seat of the car. My back was hurt, and I couldn't get her up to the seat of the car, so I took her out of the car, put her on some blankets, and covered her up. I searched for my pistol. I thought I would shoot it and [fol. 2144] somebody would hear it and come to us. I had no lights, only some matches. When I didn't find my pistol I knew if I didn't leave and go and get some help and get her out of there, the way she was bleeding, she would die in a few minutes. I climbed up the hill. I started to go to the top of the mountain. After walking up the road a little ways I found it hard walking up hill, because my right leg was hurting me so. I turned around and walked down the hill to Glenn Cove. That is where I got the men that went up with the truck. How we knew where the car went off the road was the tracks there, where the car left the road, in the dust.

Q. You didn't go down to her with the men?

A. No.

Q. You say she was lying on the floor board of the car when you first saw her after you came to?

A. She was.

Q. And you were about 25 feet to the right of the automobile when you came to?

A. I was.

Q. How far was the automobile from the place where it had left the road?

A. It was estimated at 150 or 200 feet.

Q. How did you estimate it?

A. That would have been my estimation.

Q. Was that your estimation at the time, that that was about what it was?

[fol. 2145] A. I didn't make any estimation at the time.

Q. When did you make your estimation?

A. I don't know when I made an estimation of it.

Q. Did you make it while you were still in Colorado?

A. I think so. When I went back up looking for money, I think I decided it was about 150 or 200.

Q. You figured it was about 150 or 200 feet then?

A. I did.

Q. Were you as far from the road as your wife was when you came to?

A. About the same distance.

Q. And your wife was in the car, and you were out of the car?

A. I might have been back from an angle. I might have been back of the car maybe a few feet.

Q. But you were approximately——

A. I was close enough that I could see the car. I don't remember just where I was sitting when I woke up.

Q. Now, were there any lights turned on in the car when it went down off the road?

A. I turned the lights off just a few seconds before we went over the bank.

Q. Were the lights on when you came to?

A. I don't remember whether they were on, or not, but if they were, something went wrong with them, because I couldn't leave the lights on when I left the car.

[fol. 2146] Q. When you came to and looked at the car were the lights on so that you could see the car by the lights?

A. I was very dazed; I don't remember.

Q. You testified yesterday that you couldn't see the car, and you had to use a match to see it by.

A. I couldn't see in the car. I struck matches in the car.

Q. You could see the car, itself, however?

A. I could see the car without a light.

Q. Would you say now that the lights were or were not on when you came to and looked at the car?

A. To my best recollection the lights were not on.

Q. In other words, everything was there in the dark, except as you lighted matches to see things?

A. Yes, sir; I couldn't even use my flashlight.

Q. You say you tried to lift your wife up into the seat?

A. I did.

Q. Did you succeed in lifting her up into the seat?

A. I couldn't get her up into the seat.

Q. Was her head as high as the back of the seat where a person's would normally be in sitting, at any time while you were trying to get her up into the seat?

A. No.

Q. Was her head as high as the seat part of the seat, that is, the portion that you sit on, at any time?

A. Her head was higher than that.

[fol. 2147] Q. Her head was higher than that?

A. Sure. When I sat her up in the car she was much higher than the seat.

Q. Did she lean back against the seat while you were working with her?

A. Well, I had her all over the seat, I guess, trying to get her up there. She was bleeding very fast, and I was soaked in blood, myself.

Q. And you definitely remember that you then placed her body out on the ground?

A. I placed her right by the side of the car, on a blanket.

Q. Was she lying in a position parallel to the running board of the car?

A. I think she was.

Q. Which direction was her head? Towards the front or towards the rear of the car?

A. Her head was towards the rear of the car.

Q. And her feet towards the front of the car?

A. Right.

Q. How far from the front of the car did you lay her?

A. She was right by the running board.

Q. How far?

A. I don't know how far; I don't think over two or three feet.

Q. A matter of two or three feet?

[fol. 2148] A. That is about right.

Q. Now, you say you placed one blanket under her?

A. I put one under her, and one over her.

Q. Then you left her?

A. I did.

Q. She was lying in what position? On her back?

A. Naturally she was lying on her back.

Q. Was she unconscious at the time that you left her?

A. She wouldn't talk; she would just groan. I could never get her to talk after she told me to get a doctor.

Q. Now, on the day that you found your wife dead in the bath tub, you say you left the house about 1:30 in the afternoon?

A. I would think it was that time.

Q. You got back about what time?

A. Well, I got back after the mail. I got the mail at 5:00 o'clock, and got my groceries, and went up there in a truck. I imagine 5:30.

Q. And this young man, Gerald Rogers, was with you when you went into the house?

A. He was.

Q. Did you go directly into the bedroom?

A. I did.

Q. Did Rogers go directly into the kitchen?

A. He took the groceries into the kitchen, yes.

Q. When you entered the bedroom was the door between [fol. 2149] the bathroom and the bedroom open?

A. It was.

Q. Did you look from the bedroom into the bathroom?

A. Yes, sir.

Q. Did you there see your wife's body?

A. I did.

Q. And then did you go into the kitchen?

A. I don't think so.

Q. Did you go into the kitchen at any time from the time that you first saw your wife's body until help had come?

A. I don't think so. I took hold of the body and tried to lift her out, and the water was very soapy, and I dropped her a time or two before he got there to help me.

Q. What position was she in in the bath tub when you saw her there?

A. Lying right across the bath tub.

Q. By "across the bath tub" what do you mean?

A. I mean like you would lay yourself 50-50 over a bath tub.

Q. Was there any portion of her body in the bath tub?

A. Yes, sir, her head and shoulders were in it.

Q. Her head and shoulders were in the bath tub?

A. Her thighs and hips were out of the bath tub.

Q. Her thighs and hips were out of the bath tub, were they?

A. Practically, yes.

[fol. 2150] Q. She was lying on her face, that is, face downward in the water?

A. No, she was lying on the side of her head when I first saw her; her head was kind of sideways.

Q. Where was the edge of the bath tub across which she lay, with reference to her hips?

A. I don't know where that was.

Q. Now, when you tried to lift her out of the bath tub, did you succeed in lifting her out?

A. No, I couldn't pick her up.

Q. Did you push her on into the bath tub?

A. I dropped her a couple or three times before I got help.

Q. At any time did she get into that position in the bath tub so that she was lying on her back in the bath tub with her feet sticking out over the rounded end of the bath tub?

A. She might have.

Q. In other words, you pushed her into that position?

A. I might have dropped her into that position. I didn't push her.

Q. Did you lift her entire body towards the bath tub with the idea of putting her into that position?

A. I was trying to pick her up.

Q. You were trying to pick her up; you were trying to get her out of the bath tub, were you not?

[fol. 2151] A. That is right.

Q. Now, the hips portion of her body was out of the bath tub when you first saw her, wasn't it?

A. I think so.

Q. And the only portion of her body that was in the bath tub was her shoulders, arms and head?

A. The biggest part of her body was in the water.

Q. But that didn't include the hips?

A. No.

Q. Now, where were you when you called this boy Gerald Rogers?

A. I had my arms around her in the bath tub.

Q. Did you call to him?

A. I don't know if I called to him, or not.

Q. Didn't you go into the kitchen from the bedroom, going around the bathroom into the kitchen, and open the door of the bathroom in the presence of Gerald Rogers?

A. I would think not. I walked from the bedroom——

Q. Now, let's be clear about this. I don't want your answer "You think not". Did you or did you not do that?

A. I went directly from the bedroom into the bathroom when I saw her, and if I ever went into the kitchen, I don't remember it.

Q. Would you say that you didn't go from the bedroom around through the living room into the kitchen?

A. Before I discovered the body?

[fol. 2152] Q. Before you discovered the body.

A. Yes.

Q. Would you say that you didn't go from the bedroom around through the living room into the kitchen before Gerald Rogers saw her body?

A. Well, I am not so positive about that.

Q. Did you, after seeing her body, go around into the kitchen through the living room, and open the door into the bathroom, in the presence of Gerald Rogers?

A. After I seen her body?

Q. Yes.

A. No. After I saw her body I never took my hands off of her until I got her on to the bed.

Q. Gerald Rogers helped you?

A. He helped me, yes.

Q. Well, now let's be a little surer as to exactly how much of her body was in the tub——

ME. PARSONS: Now, I object—oh, go ahead. I will withdraw it. I thought you had asked it.

MR. WILLIAMS: I might have; I am not certain.

THE COURT: There is what might be possible ambiguity

in two answers. I was going to suggest that either one or the other of counsel clarify the matter. At one time the witness said that the hip portion of the body was outside of the bath tub, and then another time he answered it that the biggest part of her body was in the water. It seems to [fol. 2153] be a possible inconsistency.

The Witness: What is the question?

[fol. 2153a] Q. Did you so state in response to that question?

A. I remember it was the Sunday before that we went to that place. What was the question?

Q. The question is to describe what portion of her body was in the water.

A. The upper portion of her body was in the water.

Q. Can you indicate on your own body the portion of her body that was in the water?

A. I would say about here.

Q. Indicating about the height of the naval?

A. Maybe a little below that.

Q. And no other portion from that point on was in the water?

A. Yes. Well, I don't know whether it was in the water. There wasn't much water in the bathtub.

Q. How much water was there in the bathtub?

A. I don't know; maybe 15 inches.

Q. And would it be correct to say that from about the point of the naval was in the bathtub and her hips were on the outside part of the bathtub?

A. As near as I can remember that would be correct.

Q. You admit that her hips were outside of the bathtub?

A. The way I would describe it would be that the lower part of her limbs was across the bathtub and her head and shoulders in.

Q. Was it across the bathtub—

[fol. 2153b] A. Across the bathtub near the middle. As far as I can remember her head was almost under.

Q. The bathtub was set against the wall on one side?

A. I think so.

Q. And she was headed against the wall at one end?

A. I don't remember about that.

Q. Was her head against—was her head towards the back wall against the long side of the bathtub?

A. Her head was practically under the faucet.

Q. And her hips and thighs and knees and calves and ankles were outside of the bathtub?

A. As near as I can remember.

Q. Yes. Now, what you did then was to try to lift her out of the bathtub?

A. I did.

Q. And you say that you were unable to do so?

A. Yes, I tried to lift her two or three times.

Q. And in the course of doing that did you push her towards the bathtub?

A. I didn't push her, but I think she fell more into the bathtub.

Q. What part of her body did you take hold of when you tried to lift her out of the bathtub?

A. Right under the arms.

Q. Right under the arms?

A. Yes, sir.

[fol. 2153c] Q. Around the waist?

A. Yes.

Q. And then did you attempt to lift her while you were in that position?

A. Yes, I attempted to lift her.

Q. And did you take hold of her at any place other than around the waist under the arms?

A. I don't think so.

.

[fol. 2154] Q. Now, Mr. James, you stated that your wife cut her toe on a piece of tin can.

A. That is what she told me.

Q. When did she tell you that?

A. Well, I think it was Sunday she told me.

Q. And did she complain that that hurt her?

A. No.

Q. Did she show you the cut?

A. She showed me the cut, that she had cut her foot.

Q. Did you observe whether or not the cut was bleeding?

A. No.

[fol. 2155] Q. You are certain that some time before her death, and you believe it was on Sunday, she told you that she had cut her foot?

A. Yes, sir, she did.

Q. Did she tell you what portion of her foot she had cut?

A. I believe she did. She hurt her toe.

Q. And that is your best recollection?

A. Yes, sir, that is my best recollection.

Q. Is there any doubt about that in your mind?

A. I don't think so.

Q. Well, now, on the 7th of August, two days after your wife was found dead at the house there, in the afternoon, in the presence of Deputy Sheriffs Gray and Killian, and the statement reporter, Lynch, did you state in response to questions by Mr. Killian as follows: "She hadn't had a swollen foot, or cut foot, or toe the Sunday before?" A.—Not that I know of, no." Did you make that statement?

A. I don't remember him asking me about the cut. I told him that she didn't have any swollen foot that I knew of.

Q. Let me read you a little more of it and see whether you can remember it. Were the following questions asked, and the following answers given by you: "Q.—Was there anything else the matter with her? A.—Not that I know of. Q.—Did she hurt herself in any way you know of, like cut-[fol. 2156] ting her foot? A.—No, I noticed in that letter she wrote her sister she said she cut her toe, but I didn't know anything about it. Q.—When did she write that letter? A.—Well, we found the letter—this young lady here—the night we found her here—her and her boy friend came up—Mary was going to let them be married here. They were kind of low on money and didn't want to spend much money. Mary thought it would be kind of nice to let them be married here. I had invited them up that night for dinner, to talk about it, and I brought them home with me. She is the one that picked the letter up and saw it was addressed to her sister, and she said that she had cut her foot, and it had swollen or something like that. I was so excited I didn't read the letter; in fact, I never did see it. Q.—She hadn't had a swollen foot or cut foot or toe the Sunday before?" A.—Not that I know of, no."

Now, will you state whether you did or did not make the statements that are attributed to you in the questions and answers that I just read?

A. I can state that I don't remember telling him she had a swollen foot, or him asking me about a cut.

Q. But this is the best answer you can give at this time, is it?

A. That is the best answer I can give.

Q. Now, I will ask you whether at a later time, in the same conversation I am talking about, which occurred out at 1329 [fol. 2157] Verdugo Road, whether the following questions were not asked you by Mr. Killian, and the following answers given you: "Q.—You were very close to your wife, that is you talked about any illness the other might have? A.—Yes. Q.—Didn't you know she had an injured foot? A.—No. Q.—Did she walk around the yard barefooted any time? A.—Yes, she has always walked around out here on this pavement. Q.—Barefooted? A.—Yes. Q.—Did she do that on Sunday? A.—Weil, I don't know whether she did or not. Q.—Did she tell you anything about cutting her foot on Sunday? A.—No. Q.—You were here all day Sunday? A.—Yes, practically all the time except what time we was out for a ride. Q.—You were with her all day Sunday? A.—Yes. Q.—She said in the letter she cut her toe? A.—I noticed that in the letter, but she didn't say anything to me about cutting her toe." Did you make those answers to those questions?

A. My recollection is that I didn't know anything about her toe being hurt.

Q. The question is did you make the answers in the manner that I just asked you?

A. I don't remember making that answer.

Q. Now, I desire to call your attention to this testimony that I have just read, that you noticed in the letter her having said something about her toe. You had seen the letter at that time?

[fol. 2158] A. No, I hadn't seen the letter.

Q. You hadn't seen the letter?

A. No, I didn't see the letter until the third day.

Q. What did you mean then when you said you noticed in the letter she had cut her toe?

Mr. Parsons: Just a minute. In the last 60 seconds he has stated there that he hadn't seen the letter.

The Court: I think there is reason for sustaining the objection, Mr. Parsons, and one of them is that he made the statement that he didn't remember it.

[fol. 2159] At the present the witness has not stated that he made that statement.

Mr. Parsons: Thank you. I haven't wanted to unnecessarily interrupt the examination.

By Mr. Williams:

Q. Now, Mr. James, and counsel I call your attention to page 2062 of the transcript, that is in volume 32, it being the testimony of this witness yesterday afternoon beginning on line 18 and ending on line 19, the following portions of the answer of the witness: "I looked into the bathroom and I found my wife in the bathtub."

Now, I will state in fairness that I understood the witness to say "I found my wife across the bathtub." I will ask the witness now which he did say, whether across the bathtub—or in the bathtub?

A. Well, I don't know whether I said "in" or "across" the tub.

Q. Well, which is a fact?

A. The fact is that she was across the tub. I would say on an angle across the tub.

Q. And that portion of her body from about the navel up was in the water, is that right?

A. That is right.

Q. Now, on August 7th, two days after your wife's body was found in this fish pond, in the afternoon of that day, at your place at 1329 Verdugo Road in the presence of Deputy Sheriffs Gray and Killion and the statement re-[fol. 2160] porter, Lynch, did you not make the following statement in reference to the following question: "Before you go on from there, what was the condition of your wife when you came home?" That is referring to Winona. "A.—Just was lying right across the bath tub with just her head in. There must have been about 12 inches of water in the tub."

Did you make that answer to that question?

A. That is not the way I meant it.

Q. Well, just answer the question. Did you make such a statement?

A. I don't remember saying that.

Q. Now, Mr. James, I will ask you whether with reference to this Pikes Peak accident in the presence of Mr. Gray and the statement reporter, Lynch, and in response to questions asked by Mr. Killion:

[fol. 2161] "Q.—Was your wife killed as a result of an automobile accident? A.—Well, our car dropped about 475 feet, and my wife was driving. We had gone up on the mountain to spend the day, and not being used to that alti-

tude, I took a terrific headache. In Denver it was weather like this here. Up there it was snow and blizzard. I had two or three pints of whiskey in my car I was taking home to my mother. They can't buy whiskey in that state like you can here. I got cold and a headache and took a few drinks. My wife wanted to drive down. Q.—Where were you? A.—Top of Pike's Peak. My wife said, 'you drove up, let me drive back'. 'You have been drinking.' 'Let me drive'. 'I'll feel better.' I let her drive. I had some field glasses I was watching the sunset with. I had my window down and my head out of the window, so as we was driving along she said, 'turn on the lights', and I said, 'What do you want the lights on for when the sun is shining? So she didn't answer me and in the meantime—I had the car so long—I just reached over and flipped the lights with my finger and put them on.

I don't believe we went half a mile until I got thinking, well, maybe I hurt her feelings, and I just stuck my head out of these glasses as I saw the car ready to tumble. There was nothing I could do. It just kind of spun through the air as I raised up. She had come to a switch back to turn like this. They come down that in second. Instead of making the turn she come right down there. Q.—When you [fol. 2162] dropped there was that to the left side of the road? A.—The road comes straight, and it seems like it is kind of a canyon where you cross over, and the car went right straight over into this canyon. Q.—She was supposed to make a right turn? A.—Yes.

Q.—You were sitting on the righthand side of the car? A.—Yes. Q.—Did you jump? A.—No, I don't know how I got out of the car. I didn't have time to jump. I never did even get to look at her. Q.—Did you go down 450 feet or where? A.—No, I was thrown out about half way down. I was hitting the rocks and was trying to grab them to stop myself. I knew I was rolling but I couldn't stop. Q.—What injuries did you receive? A.—I just was black and blue *all* was all. I didn't break my bones. Q.—What were the extent of her injuries? A.—She had a very bad fractured skull. Her head was just smashed. Q.—How long did she live after that? A.—She lived about a month. Her head was hit here and broke just like a piece of glass all the way round. Q.—She was taken to a hospital? A.—Yes. I come to. It was dark there and when I come to I could see the lights I had flipped on burning down below me. It looked

like it was straight down, so I decided that was my car and began to climb to it. Q.—I thought you said you flipped your lights off? A.—I flipped them on, and by having the lights on, I could locate the car. If the lights had not been on I would never have known where to go because it was as dark as a dungeon. I climbed to the car. She was lying with her head out and her head was on the running board. [fol. 2163] It was just a bunch of blood running out of her. I tried to sit her up on the side and my back was hurting so I couldn't pick her up. I dragged her out on the ground and tried to fix her head up then I walked to Glen Cove."

Is that what you stated in response to those questions?

A. That is with the exception of the distance of the car and the lights.

Q. You didn't state the matters with respect to the distance of the car and the lights as I read them?

A. The light I was referring to was the light that could be seen in Glen Cove through the canyon, and the distance is if it hadn't hit the rock or the boulder it would have rolled about 475 feet.

Q. Now, it is a fact, is it not, that you collected the insurance from your nephew O'Neil in the month of September, 1934?

A. No. I am not positive when I collected that insurance. It seems to me like that was the time he got killed and I collected the insurance about six months later.

Q. What company was that?

A. It was Government insurance.

Q. I will ask you whether, at the time and place that I have been asking you about, namely on the 7th of August, in the afternoon, at your home at 1329 Verdugo Road in the presence of Deputy Sheriffs Killion and Gray and the statement reporter Lynch, you didn't state in respect to your nephew O'Neil and his insurance as follows, in response to [fol. 2164] the following question: "Q.—Did you carry some insurance on him? A.—No, he carried his insurance. Q.—Who was his beneficiary? A.—I was. Q.—What company carried that insurance? A.—That was Government insurance. Q.—Was he an ex-soldier? A.—He was a Navy man. Q.—How much insurance? A.—\$5,000.00. Q.—If it becomes necessary to go into your personal affairs you don't mind? A.—I don't mind. Ask me anything you like. Q.—You say you haven't any money at the present time. What

became of that \$5,000.00? A.—That was in September last year, last year ago.”

Did you so answer?

A. I might have done. My mind was terribly confused and upset at that time.

Q. Well, would you say you did or did not; that is the question.

A. I don't remember. The record would show that.

Q. Now, did you at any time agree with your wife that it would be all right with you if she had an abortion committed?

A. I begged her not to.

Q. At all times you objected to an abortion; you wanted to have a Bobby Junior, as you put it?

A. Well, at the beginning of it I did.

Q. And your wife suggested that she didn't want to go through with it and she wanted to have an abortion?

A. After she became so ill she wanted to get rid of it.

Q. Now, is it a fact that on the Wednesday preceding your [fol. 2165] wife's death at your house at 1329 Verdugo Road, that in the presence of Mr. Pemberton and Miss Viola Lueck who has just become Mrs. Pemberton, and yourself, that you said to Viola Lueck as follows: “Mary is crazy to have a baby, but I don't want one”?

A. I don't remember that.

Q. Would you say that you didn't say that?

A. I would say that I don't remember stating it.

Q. That is the best answer you can give on that?

A. That is the best I can give you.

Q. Now, Mr. James, you stated this morning that you had a conversation over the telephone with Mr. Hope on the day that you found your wife's body, is that correct?

A. That is correct.

Q. Did he call you or did you call him?

A. He called me.

Q. What did he say to you and what did you say to him?

A. He told me that he was downtown, that he had to come downtown on some business and told me that my wife said to bring some cottage cheese home.

Q. Did he say anything to you on the subject of whether his wife had or had not had any operation or abortion performed upon her?

A. My wife?

Q. Whether your wife had, yes.

A. He didn't say anything about it.

[fol. 2166] Q. Did you ask him anything about it?

A. I didn't ask him a thing about it.

Q. You stated this morning that the last thing he said to you, that was said to you before you left home was, that your wife said that Hope was going to help her get rid of the baby.

A. What time are you talking about?

A. On the Monday morning you left home.

* * *

Mr. Williams: Did you so state, Mr. James?

A. I don't remember saying it that way.

Q. Do you remember what that last thing was that your wife did say to you before you left home?

A. I remember the conversation that she and Hope and I had before I left.

Q. What was that conversation?

A. The conversation was that I told Hope that she wanted to see him and we went in the house and she told Hope she hadn't menstruated yet and he told her that she would and he would stay there with her.

Q. All right, now, when Hope called you in the morning [fol. 2167] over the telephone did you ask him anything about whether your wife had started to menstruate yet?

A. I couldn't talk about anything like that over the phone.

Q. Well, did you?

A. No.

Q. Did you ask him anything about your wife's condition?

A. I don't think I asked him anything about it.

* * *

Mr. Williams: Did you know yourself of your wife having been in the company of anybody after Mr. Hope left her on Monday morning?

A. No.

Q. When was the next time that you talked with Hope after he called you on the telephone on Monday?

A. I don't remember when I saw Hope after my wife's death.

Q. And it was a matter of a number of weeks was it not?

A. I can't remember. It seems like it was after I went back to work in the shop.

Q. When you did see him did you have a conversation [fol. 2168] with him upon the subject of your wife's death?

A. I did.

Q. What did you say to him?

A. I was discussing her death with him.

Q. What did you say to him?

A. I don't know if I remember what all I said to him. I asked him if he had performed the abortion and he said he did. I said, "Why didn't the autopsy surgeon find something wrong with her?" And he said it hadn't had time to show any complications, that there had been anything wrong with her.

Q. Did you make any report to any officer or official to the effect that immediately prior to your wife's death Hope had performed an abortion upon her?

A. Not that I remember of.

Q. Did you believe or suspect that immediately prior to your wife's death Hope had performed or intended to perform an abortion upon her?

Mr. Parsons: Just a moment, it is incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Parsons: Asked and answered in other respects.

The Court: You may answer.

A. That is what he said.

Mr. Williams: I am asking you whether you believed it. Did you believe it?

A. Yes, I believed it.

[fol. 2169] Q. Now, on the 7th day of August what was your belief as to the cause of your wife's death?

Mr. Parsons: I submit I believe it has been asked and answered.

The Court: I don't believe that question has been asked. You may answer.

A. My belief was that she had fainted and fallen into the water.

By Mr. Williams:

Q. Did you believe that the cut which you have referred to in your testimony had had anything to do with her death?

A. No, I never gave it a thought.

Q. Did you believe that the bite of an insect at that time had anything to do with her death?

A. I did not.

Q. Did you at any time ever form the belief that the cut which you have talked about had anything to do with her death?

Mr. Parsons: That is incompetent, irrelevant and immaterial.

The Court: Let me have the question.

(Question read by the reporter.)

The Court: You may answer.

A. That question has got me confused.

The Court: Well, did you at any time think that the injury to her foot had anything to do with her death?

A. No, I didn't know anything about the injury to her [fol. 2170] foot being swollen.

By Mr. Williams:

Q. Do you mean to say you didn't know at any time about this cut on her foot?

Mr. Parsons: No, he hasn't said that. Just a minute.

Mr. Williams: In response to a question about the cut he said something to the effect that he didn't at any time believe something.

Mr. Parsons: I believe the answer should be read.

The Court: Read the answer, please.

(Answer read by the reporter.)

Mr. Williams: Did you form the opinion at any time that an insect bite had contributed to your wife's death?

Mr. Parsons: It is incompetent, irrelevant and immaterial.

The Court: It is preliminary. Overruled.

A. I heard Dr. Wagner's testimony at the inquest and he said that she had a cellulitis infection probably caused by a Black Widow spider bite and then I formed the opinion that the bite might have made my wife sick and caused her ankle to swell and it might have caused her death.

Q. That is based on your assumption that Dr. Wagner

stated at the Coroner's Inquest that she might have been bitten by a Black Widow spider?

A. That is right.

* * * * *

[fol. 2171] Mr. Williams: Isn't it a fact that the report which was read is as follows: "Autopsy Report. I performed an autopsy on Mary Emma James August 6th, 1935 at the Los Angeles County Coroner's Mortuary and found a laceration on the plantar surface of the left great toe and an acute cellulitis of the foot and leg, the left thigh was considerably swollen. On opening the body I found the lungs contained a considerable amount of water. There was no disease of any of the vital organs. The uterus [fols. 2172-2174] showed a normal pregnancy of about six weeks duration. Superficial bruises of varying extent were found on various parts of the body. A chemical analysis of the stomach, liver and kidneys was made, but no poison found. The cause of death was drowning, contributory cause acute cellulitis of the left leg. Signed, A. F. Wagner, Los Angeles County Autopsy Surgeon."

Isn't that the report that was read at the Coroner's Inquest?

A. I can't remember all the report.

Q. You didn't hear any testimony regarding the cause of death other than that report at the Coroner's Inquest, did you?

A. That is all the report I heard.

Mr. Williams: That is all.

* * * * *

[fol. 2175] Q. Did you believe on the 30th of August, 1935, did you believe that the cause of your wife's death was drowning, contributory cause insect bite?

A. I heard the "cellulitis infection", and I didn't know what it meant, and I asked the man at the coroner's office what that word meant, and he said it was probably caused by a black widow spider bite. That was where I got the idea.

Q. You still haven't answered my question. Did you believe on the 30th of August, 1935, at the time that this oath was administered to you, that the cause of your wife's death was drowning, and the contributory cause insect bite?

Mr. Parsons: I believe he has given an answer.

The Court: I don't believe he has answered it. The question is "Did you?"

A. I believe the death could not have been from the black widow spider.

Mr. Williams: That is all. I have no further questions.

Redirect examination.

By Mr. Parsons:

Q. Now, Mr. James, Mr. Williams inquired of you concerning a judgment which had been obtained against you. So far as you know, was that judgment—was there any action to reduce it to a judgment here in California?
[fol. 2176] A. No, not in California that I know of.

Q. And do you know whether or not a judgment has definitely ever been obtained against you in Alabama?

A. All I know is hearsay. I wasn't there.

Q. And did that arise out of the same difficulty that you had with your sister?

A. It did.

Q. And did you owe anybody any money?

Mr. Williams: Objected to as calling for a conclusion of the witness, in view of the statement.

The Court: I think that is probably true. I think that does call for a conclusion.

Mr. Parsons: Well, I believe on cross examination that they can go further in the matter.

The Court: Well, the difficulty is that you are allowing the witness to interpret his judgment. It is just like a question of Jones owing Smith—

By Mr. Parsons:

Q. Have you ever been served with any judgment against you from Alabama, or any other place? Have you ever received any such service, from Alabama?

A. No.

* * * * *

[fols. 2177-2178] DR. JAMES DEWITT GEORGE, recalled as a witness in behalf of the Defendant, having been previously sworn, testified as follows:

Direct examination.

By Mr. Parsons:

Q. Dr. George, in 1935, in the month of July of that year, did you have occasion to treat or consult professionally with Mary Busch James, the wife of the defendant here?

A. Yes, sir. Mrs. James came in my office July 16th for the first time, and I saw her again in her home about two weeks later.

Q. Now, upon the occasion of your first examination on July 16th, did you come to any conclusion with reference to whether or not she was pregnant at that time?

A. I diagnosed pregnancy.

Q. And during the course of your treatment of this woman did she have any symptoms of nausea?

A. Yes, sir.

Q. And at any time did she have any symptoms, or history of sleeplessness?

A. Yes.

Q. And did you prescribe for her for sleeplessness?

A. Yes, sir.

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[fols. 2179-2183] SCOTT LITTLETON, called as a witness in behalf of the Defendant, being first duly sworn, testified as follows:

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[fol. 2184] By Mr. Parsons:

Q. Now, so far as you know, Mr. Littleton, how many hours elapsed from the time of the arrest of Mr. James on the morning of April 19th, until he was permitted to sleep?

Mr. Williams: May I request that your Honor instruct the witness to answer according to his own knowledge?

The Court: Yes, of course, do not give us any statement as to what might have been; just as far as you know.

A. I never saw him sleep.

By Mr. Parsons:

Q. You never saw him sleep?

A. That is right.

Q. And you saw him Sunday off and on until Tuesday sometime, or Wednesday, did you not?

A. Off and on, but not steadily.

Q. Now, how often were you away from the house, and for what hours were you away?

A. Well, from the time that we made the Dictaphone set up at the house until the time of the arrest, I was there almost continuously. However, at the time of the arrest, or after the time of the arrest, I would go to my home in the middle of the evening, or toward the end of the evening, because at that time I had a little trouble with my heart, and needed a rest.

[fol. 2185] Q. Well, how long would you be there at a time, Mr. Littleton?

A. Well, it would vary, Mr. Parsons.

Q. Well, on Sunday—how long were you away Sunday, the 19th?

A. Sunday the 19th?

Q. Yes.

A. Well, now, Sunday the 19th all day long, if I remember correctly, I was very tired in the early part of the evening, and I think I went home about—well, let me see; my best recollection is in the neighborhood of 9:00 o'clock.

Q. About 9:00 o'clock in the evening?

A. Yes, sir.

Q. Do you know when you returned?

A. I returned early the following morning.

Q. About what time?

A. My best recollection again is in the neighborhood of 8:00 o'clock, or possible half past 8:00, or a quarter after 8:00.

Q. Now, you talked with Mr. Hope after his arrest, on the way in from Hermosa Beach to Los Angeles, did you not?

A. Yes.

Q. And I will ask you whether or not any conversation was held with Mr. Hope upon the subject of his testifying, or rather, as to his talking, telling what he knew, if any- [fol. 2186] thing, and that it would be to his advantage to do so?

* * * * *

[fols. 2187-2196] A. No.

By Mr. Parsons:

Q. Well, while you were coming from Hermosa Beach to Los Angeles, you tried to get over to Mr. Hope the idea that the more he talked the better his chance would be in escaping the rope, isn't that a fact?

Mr. Williams: Objected to as leading.

The Court: You may answer. It is simply bearing upon the question that I have in mind that Mr. Hope was interested in a degree in the fact that his testimony would affect his personal case and problem. You may answer.

A. No, I don't recall that I did. It occurred to me that a man with any common sense would know that.

* * * * *

[fol. 2197] ROBERT F. HERRON, called as a witness in behalf of the People in rebuttal, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Robert F. Herron.

Direct examination.

By Mr. Williams:

Q. Mr. Herron, you are employed by the District Attorney of Los Angeles County?

A. Yes, sir.

Q. In what capacity?

A. Statement reporter, District Attorney's office.

Q. And you have been occupying that position for a great many years, have you not?

A. Yes, sir.

Q. On March 31st, 1936, did you attend a trial in the District Court of the United States for the Southern District of California, before Honorable Leon R. Yankwich, at which time the defendant in this case, Robert S. James, was testifying on the stand?

A. Yes, sir.

Q. I will ask you whether at that time he stated in response to the following questions as follows: "Q—Did you remember you took your sister and your wife to the lion farm and your wife fainted? A—I remember going to the lion farm, but my wife didn't faint. Q—She didn't? A—[fol. 2198] No. Q—Didn't she faint about that time? A—No, I never knew her to faint in my life."

Was that statement made? Were those answers made by the defendant in response to those questions at that time?

A. Yes sir, they were.

* * * * *

EDWARD F. LYNCH, recalled as a witness in behalf of the People in rebuttal, having been heretofore duly sworn, testified as follows:

Direct examination.

By Mr. Williams:

Q. Mr. Lynch you have already testified in this case, that you are a statement reporter for the Sheriff of Los Angeles County and have been for a number of years?

A. Yes, sir.

Q. Were you present at the premises located at number 1329 Verdugo Road in La Canada, California, about 1:35 P. M. on August 7th, 1935 at which time there were present Deputy Sheriff Virgil Gray, Willard Killion, Mr. Robert S. James, the defendant in this action?

A. Yes, sir.

Q. At that time and place in answer to questions asked by Mr. Killion were the following answers given by this defendant:

[fol. 2199] "Q. Was there anything else the matter with her?

A. Not that I know of.

Q. Did she have any—did she hurt herself in any way you knew of, like cutting her foot?

A. No, I noticed in that letter she wrote her sister she said she cut her toe, but I didn't know anything about it.

Q. When did she write that letter?

A. Well, we found the letter—this young lady here—the night we found her here—her and her boy friend came up—Mary was going to let them be married here. They were kind of low on money and didn't want to spend much money. Mary thought it would be kind of nice to let them be married here. I had invited them up that night for dinner, to talk about it, and I brought them home with me. She is the one that picked the letter up and saw it was addressed to her sister, and she said that she had cut her foot, and it had swollen or something like that.

I was so excited I didn't read the letter; in fact, I never did see it.

Q. She hadn't had a swollen foot or cut foot or toe the Sunday before?

A. Not that I know of, no."

Were those answers given in response to those questions?

A. Yes, sir.

Q. I will ask you whether or not in answer to questions asked by Mr. Killion the following answers were given:

[fol. 2200] "Q. Was your wife killed as a result of an automobile accident?" Referring to the wife, Winona.

"A. Well, our car dropped about 475 feet, and my wife was driving. We had gone up on the mountain to spend the day, and not being used to that altitude, I took a terrific headache. In Denver it was weather like this here. Up there it was snow and blizzard. I had two or three pints of whiskey in my car I was taking home to my mother. They can't buy whiskey in that state like you can here. I got cold and a headache and took a few frinks. My wife wanted to drive down.

Q. Where were you?

A. Top of Pikes Peak. My wife said, 'You drove up, let me drive back.' 'You have been drinking'. 'Let me drive.' 'I'll feel better.'

I let her drive. I had some field glasses I was watching the sunset with. I had my window down and my head out of the window, so as we was driving along she said, 'Turn

on the lights', and I said, 'What do you want the lights on for when the sun is shining?' So she didn't answer me and in the meantime—I had the car so long—I just reached over and flipped the lights with my finger and put them on.

I don't believe we went half a mile until I got thinking, well, maybe I hurt her feelings, and I just stuck my head out of these glasses as I saw the car ready to tumble. [fol. 2201] "There was nothing I could do. It just kind of spun through the air as I raised up. She had come to a switch back to turn like this. They come down that in second. Instead of making the turn she come right down there.

Q. When you dropped there was that to the left side of the road?

A. The road comes straight, and it seems like it is kind of a canyon where you cross over, and the car went right straight over into this canyon.

Q. She was supposed to make a right turn?

A. Yes.

Q. You were sitting on the right hand side of the car?

A. Yes.

Q. Did you jump?

A. No, I don't know how I got out of the car. I didn't have time to jump. I never did even get to look at her.

Q. Did you go down 450 feet or where?

A. No, I was thrown out about half way down. I was hitting the rocks and was trying to grab them to stop myself. I knew I was rolling but I couldn't stop.

Q. What injuries did you receive?

A. I just was black and blue was all. I didn't break any bones.

Q. What were the extent of her injuries?

A. She had a very bad fractured skull. Her head was just smashed.

Q. How long did she live after that?

[fol. 2202] A. She lived about a month. Her head was hit here and broke just like a piece of glass all the way round.

Q. She was taken to a hospital?

A. Yes. I come to. It was dark there and when I come to I could see the lights I had flipped on burning down below me. It looked like it was straight down, so I decided that was my car and began to climb to it.

Q. I thought you said you flipped your lights off?

A. I flipped them on, and by having the lights on, I could locate the car. If the lights had not been on it I would never have known where to go because it was dark as a dungeon. I climbed to the car. She was lying with her head out and her head was on the running board. It was just a bunch of blood running out of her. I tried to sit her up on the side and my back was hurting so I couldn't pick her up. I dragged her out on the ground and tried to fix her head up then I walked to Glen Cove."

Were those answers given to those questions?

A. Yes, sir.

Q. I will ask you whether at that time in response to the following questions the following answers were given by the defendant: "Before you go on from there, what was the condition of you wife when you came home?"

A. She was lying right across the bath tub with just her head in. There must have been about 12 inches of water in the tub."

[fol. 2203] Was that answer given to that question?

A. Yes, sir.

Q. In response to questions on the subject of his nephew, O'Neil, did the defendant at the time and place that I have just mentioned make the following answers to the following questions: "Q. Did you carry some insurance on him?

A. No, he carried his insurance.

Q. Who was his beneficiary?

A. I was.

Q. What company carried that policy?

A. That was Government insurance.

Q. Was he an ex-soldier?

A. He was a Navy man.

Q. How much insurance?

A. \$5,000.00.

Q. If it becomes necessary to go into your personal affairs you don't mind?

A. I don't mind. Ask me anything you like.

Q. You say you haven't any money at the present time. What became of that \$5,000.00?

A. That was in September last year, last year ago."

Did he so answer in response to those questions?

A. Yes, sir.

Q. Did he, in response to the following questions at the same time and place and in the presence of the same persons make the following answers: "Q. You were very close [fol. 2204-2205] to your wife, that is, you talked about any illness the other might have?

A. Yes.

Q. Didn't you know she had an injured foot?

A. No.

Q. Did she walk around in the yard barefooted at any time?

A. Yes, she has always walked around out here on this pavement.

Q. Barefooted?

A. Yes.

Q. Did she do that on Sunday?

A. Well, I don't know whether she did or not.

Q. Did she tell you anything about cutting her foot on Sunday?

A. No.

Q. You were here all day Sunday?

A. Yes, practically all the time except what time we was out having a ride.

Q. You were with her all day Sunday?

A. Yes.

Q. She said in the letter she cut her toe?

A. I notice that in the letter, but she didn't say anything to me about cutting her toe."

Did he so answer in response to those questions?

A. Yes, sir.

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[fol. 2206] Mr. Parsons: During the course of the cross examination of the defendant and during the course of the reading of various questions and answers during the conducting of the cross examination, reference has been made to the Colorado incident, and at this time I move to strike out all of that testimony upon the grounds and for the reasons heretofore set forth.

The Court: Let the record show that the Court at the time [fols. 2207-2211] that the questions were propounded had the situation in mind and was acting on the theory that a general objection having been made to the Colorado incident, that the Court would of its own accord overrule the

objection as to each question, but didn't desire to interrupt the proceedings. Let the record show that in fairness to the defense it should be assumed that these objections were made at the time the various questions were propounded and that those objections were overruled. The Court feels it is only fair to the defense because the Court insisted that each time the objections would have been made that the objection be deemed to run, and it was only the desire of counsel to conduct the trial in as orderly a manner as possible and the statement that the objection would have been deemed to have been made that kept counsel from objecting to each and every question.

Mr. Williams: I may say on behalf of the People that we understood the objections were going to all of the questions.

Mr. Parsons: Oh, yes. We all understood that.

The Court: I am of the opinion that the objection has been so specifically made that the record is protected so that if this Court is in error in admitting the Colorado matter, it attaches to all the Colorado testimony.

* * * * *

[fol. 2212] OBJECTION TO EXHIBITION OF SNAKES

The Court: Sometimes this Court does things without any particular precedent. Perhaps what I am going to do is without precedent, but I think it cannot be criticized. I appreciate, ladies and gentlemen, that the attitude of individuals towards snakes varies very considerable. Some people have a very strong feeling against them, very much impressed adversely by them; other persons are not adversely affected emotionally at all. I want you to be frank with me. Would it, in the slightest degree cause any of you any nervousness if the snakes were kept in the box and placed on the table there by Mr. Williams? I have known people who were so much opposed to snakes that they wouldn't get within 100 feet of them. I have also seen young children handle snakes, harmless ones, of course, [fols. 2213-2236] without the slightest hesitation.

If there is no objection, it may be done then.

Mr. Parsons: If your Honor please, heretofore we made an objection to the introduction of the snakes in evidence as to their being exhibited here at this time, we renew the objection to this procedure.

The Court: The objection will be noted and overruled.

* * * * *

[fol. 2237] DR. A. F. WAGNER, recalled as a witness in behalf of the People in rebuttal, having been heretofore duly sworn, testified as follows:

Mr. Clark: I understand that Dr. Wagner is called in rebuttal, your Honor?

The Court: I so understand it, unless there is some other indication.

Mr. Clark: I just wanted to inquire whether or not the Court had permitted the prosecution to reopen the case.

The Court: No.

Direct examination.

By Mr. Williams:

Q. Dr. Wagner, in your examination of the body of Mary Busch James, did you make any examination of the uterus and vagina and the other—

Mr. Parsons: Just one moment, that is objected to on the ground it is not rebuttal examination, but is part of the prosecution's case in chief.

The Court: Objection overruled. If there be any doubt about it, the Court will permit the reopening of the testimony [fol. 2238] for the present subject matter.

Mr. Clark: I have no objection to the matter being reopened for the present, your Honor, but in as much as the substantial right of the defendant may be affected, I think the record ought to be explicit.

The Court: I am permitting it under both theories. I still say, however, that I think it is proper rebuttal because the fact appears to be involved that was not in the case at the time of the direct.

Mr. Clark: I don't want to seem contentious, your Honor, I make the objection and I don't mean to pursue the matter further.

Mr. Williams: I don't think I completed the question, so I will start it over again: At the time that you examined the body of Mary Busch, making your autopsy, did you examine the vaginal region?

A. You mean including the uterus?

Q. Yes.

A. I examined the uterus and the posterior part of the vagina.

Q. What condition did you find to exist in the vagina?

Mr. Clark: May the same objection be shown as the objections heretofore made?

The Court: Yes, the objection will be shown and the objection overruled.

A. I found them in normal condition.

[fol. 2239] By Mr. Williams:

Q. Did you find any evidence of pregnancy?

A. I did.

Q. What was that?

A. There was a pregnancy of six weeks.

Q. In other words, you found a fetus there?

A. Yes, sir.

Q. Did you find any indication of an abortion having been committed?

A. I have not.

Q. Did you find any indication of an abortion having been attempted?

A. No sir, I did-

Mr. Williams: You may cross examine.

Mr. Clark: Were you through?

Mr. Williams: Yes.

Mr. Clark: I beg your pardon.

Cross-examination.

By Mr. Clark:

Q. Now, Doctor, the presence of the fetus in the uterus was absolutely conclusive that an abortion had been committed, that is true, is it not?

A. Yes, sir.

Q. And an abortion might be affected either by drugs or instruments or by violent exercise, might it not?

A. They have happened in connection with those, yes sir.
[fols. 2240-2243] Q. And if an operation was attempted in any other manner than by the way of instruments, you would not be able to ascertain that such an attempt was made?

A. No.

JACK SOUTHARD, recalled as a witness in behalf of the People in rebuttal, having been heretofore duly sworn, testified as follows:

Direct examination.

By Mr. Williams:

Q. I will ask you whether, in the District Attorney's office on the night of May 2nd and 3rd, 1936, in a conversation with the defendant you told him that the statement—you told him to tell that he got his wife very drunk and insisted that she write the letter and that he dictated it?

* * * * *

[fols. 2244-2245] By Mr. Williams:

Q. Mr. Southard, did you in the District Attorney's office, on the night of May 2nd and 3rd, 1936, have a conversation with the defendant in which you told him to tell that he made his wife very drunk, and insisted that she write that letter, and that he had dictated it?

A. I did not.

* * * * *

[fol. 2246] CARL H. SCOBIE, called as a witness in behalf of the People in rebuttal, being first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Carl H. Scobie.

Direct examination.

By Mr. Williams:

Q. What is your occupation, Mr. Scobie?

A. Salesman for the Hertz Auto Exchange.

Q. And did you ever have any experience in the matter of snakes?

A. I have, yes, sir.

Q. Over what period of time?

A. Approximately 9 years.

Q. And during that time what have you had to do with snakes?

A. I inspected them on various occasions. I have studied and collected them, and donated them to various societies.

A. Have you done any reading on the subject of snakes?

A. Yes, sir.

Q. Have you had any contact with curators of shows, or dealers in snakes?

A. I have, yes, sir.

Q. State what that contact has been?

A. I have an uncle, since deceased, but one of the most famous herpotologists in the Country, of Atlantic City, who [fol. 2247] has recently died—

Mr. Clark: If your Honor please, I am going to ask that that answer be stricken out, and that I be permitted—

The Court: I think I will strike part of the answer. I will strike the answer. You may reask the question.

Mr. Williams: Did you understand what he said—

A. Well, these conversations I had with my uncle were merely the conversations of a famous herpotologist.

The Court: You may strike out the word "famous".

Mr. Clark: I think that the witness understands that, ²and just happened to use the word "famous".

The Court: I think the answer was an actual answer to the question.

Mr. Williams: The question was—

The Court: I think we have covered that. I struck out the word "famous".

By Mr. Williams:

Q. My question included any connection, if any, he had in the snake business, without expressing any opinion as to the qualifications of anybody that he did business with.

A. I have dis-ussed reptiles with Dr. Ditmers, and other men, the chief of the St. Louis Zoo, and also the San Diego Zoo, and Mr. Webster, and when we got in a discussion with these gentlemen, we talked snakes in general.

Q. Now, have you, yourself, gathered any snakes in the State of California.

[fol. 2248] A. Yes, I have.

Q. Are you familiar with the variety *Crotalus Atrox*?

A. I am, yes, sir.

Q. How long have you been familiar with that variety of snake?

A. Approximately 15 years. I will correct that. I think it has been 18 or 20 years.

Q. And have you, yourself, caught any other wild state snakes of that variety?

A. I have, yes, sir.

Q. Can you state of your own knowledge whether snakes of that variety do inhabit the Imperial and Riverside Counties of the State of California?

A. Yes, sir.

Mr. Clark: That is objected to—just a moment. May I have the answer stricken for an objection?

The Court: Make your objection, and then I will rule on the motion to strike.

Mr. Clark: My objection is that the testimony is incompetent, that no foundation has been laid for it.

The Court: Objection overruled.

Mr. Williams: The answer is already in.

The Court: The answer may stand.

Mr. Williams: Can you state when you have captured snakes of the *Crotalus Atrox* variety in either Riverside or Imperial Counties, in the State of California?

[fol. 2249] Mr. Clark: The same objection to that question that was last stated, your Honor.

The Court: The same ruling, and basing it upon the fact that Dr. Weinberg testified in regard to *Atrox* not living in California, and I think it is proper, he having produced that testimony, for the prosecution to meet it.

Mr. Clark: I don't think there is any question as to the subject matter being a proper subject of rebuttal. My objection goes to the competency of the witness to give the testimony.

The Court: Objection overruled.

Mr. Williams: Now, will you read the question Mr. O'Brien?

(Question read by the reporter.)

A. I have caught them almost every year with the exception of this year. I haven't gotten out this year yet,—since the year of 1921.

Q. Can you state as to whether those snakes grow in large or small numbers in Riverside and Imperial Counties?

Mr. Clark: That is objected to upon all of the grounds last stated, and upon the further ground that it does not

appear that the witness has had any such experience as would enable him to express an opinion on the subject.

The Court: The objection will be overruled.

A. I haven't found that particular species, as many of them, in California as I have in Western Texas and Arizona. However, I have found—I usually collect half a dozen or a dozen on each occasion when I go out. I stay out long enough to collect that many.

By Mr. Williams:

Q. Do you mean that variety?

A. Of that variety. I go in for a number of varieties, the different kinds that I like to collect.

Q. And that has been true in the years from 1921 to 1935, inclusive?

A. Since I have been in California, yes, sir.

Q. Now, have you had any experience with the *Crotalus Atrox* in captivity, as to the length of time that it does live?

A. I have, yes, sir.

Q. And state what your experience has been?

A. I have had one in captivity which lived for 18 months without food. I have one in court now, which I brought in this morning, which has lived for one year, since the first part of July last year, and that snake hasn't fed yet, the same species.

Q. From what source did you get the snake that you have here?

A. I purchased that snake from Mr. Houtenbrink.

Q. Have you had any experience with other *Crotalus Atrox*, besides those two, living in captivity?

A. Lots of them.

Q. What would you state has been your experience as to [fol. 2251] the average life of snakes of that variety, in captivity?

A. The best I can say on that is the fact I had one approximately 18 months which died after having not fed during that period of time, but I personally had that snake in captivity, which I caught myself in the Imperial Valley and kept 18 months.

Q. What is your experience with reference to rattlesnakes of this variety striking? Are they able to strike from any position except a coiled position?

A. Yes, sir.

Q. Can you describe, for the benefit of the jury, the various positions in which you, yourself, have seen snakes of this particular variety strike?

A. I have seen them strike in all positions. Ordinarily they coil, if they are startled, or if you happen to come up on them suddenly. If you startle them or scare them they will coil, otherwise they will get into a quick striking position, that places their body in sort of an "S" position, and that is the fastest striking position there is. They can strike much faster from that position than they can from a coil.

Q. Now, have you had any experience with snakes striking in any direction except a straight-out direction?

A. A snake is a fairly good judge of what he is striking at. He will strike at any angle.

Q. What about the speed of the strike?

[fol. 2252] A. I can't hear you?

Q. I say, what about the speed at which a rattlesnake strikes?

A. The speed?

Q. Yes.

A. I would say that the rattler, when striking in that position, when his body is in an "S", I would say is much faster than when he is entirely coiled.

Q. Does a rattlesnake, in your experience, have to wait and engage in any reflection before he strikes at a rapidly moving object?

A. No, sir.

Q. What do you know of the eye-sight of a rattlesnake?

A. In my opinion, the eye-sight at a distance over 10 feet away is very poor.

Q. And under 10 feet what is it?

A. He is very, very accurate.

Q. Have you examined the two rattlesnakes which are in evidence as People's Exhibit No. 20 in this case?

A. Referring to the two snakes here, Mr. Williams?

Q. Yes.

A. I have just looked at them. I haven't examined the snakes.

Q. Are they the same variety of snake that you say you have had for a year, and 18 months, respectively?

A. Yes, sir.

[fol. 2253] Mr. Clark: Just a minute. I object to that on the ground it calls for incompetent testimony, that no foun-

dation has been laid for it, that it asks for an opinion which it is not shown that the witness is competent to express.

The Court: The objection will be overruled.

Mr. Williams: You may cross examine.

[fol. 2254] Cross-examination.

By Mr. Clark:

Q. Now, there are rattlesnakes in the Sierra Nevada Mountains in this state, are there not?

A. Yes.

Q. There are rattlesnakes in the Coast Range Mountains, are there not?

A. Yes, sir.

Q. There are rattlesnakes in the Tehachapi Mountains, are there not?

A. Yes, sir.

Q. There are rattlesnakes upon the Mojave Desert, are there not?

A. Yes, sir.

Q. And have you collected rattlesnakes in the Sierra Nevada Mountains?

A. I have, yes sir.

Q. Have you, in collecting rattlesnakes in those mountains, visited the south fork of the Kern River region?

A. I have, yes sir.

Q. Have you visited the foothills of Madera County?

A. Pretty close to them.

Q. Have you collected rattlesnakes in the Coast Range Mountains also?

A. The Coast Range, that is the Santa Monica Mountains?

Q. Well, I would say the mountains along the western side [fol. 2255] of Fresno and the eastern side of Monterey, that chain of mountains.

A. I haven't collected much in that territory.

Q. Do you think you know the snake you have spoken of as *Crotalus Atrox*, sufficiently well enough to identify it from other varieties or species?

A. I do, yes sir.

Q. By the way, the term "variety" and "species" have been used here as applied to rattlesnakes. How many distinctive species of rattlesnakes do you recognize?

A. In what territory?

Q. All over the world.

A. About 19 altogether.

Q. And will you just be kind enough to name the 19 species of rattlesnakes?

A. There are some in Central America and other territories which I am not familiar with, but we have in this country those that I have become familiar with. There is one that I am familiar with, the Gray's rattlesnake which comes from Old Mexico.

Q. What is its scientific name, if you please?

A. They all belong to the *Crotalus* family. There are three others that don't belong to the *Crotalus* family.

Q. Then you use the term "*Crotalus*" as identifying a family rather than a species, is that right?

A. A family.

[fol. 2256] Q. And how many different species in your opinion are there embraced in the *Crotalus* family?

A. How many?

Q. Yes.

A. There are approximately 16.

Q. Now, can you give the specific names of the other members of the *Crotalus* family other than the *Crotalus Atrox*?

A. There are a few in the east that I am not familiar with. I have seen them; I am not familiar with them. I haven't studied that particular species of the rattlesnake family, but I am familiar with practically all of the western species.

Q. Let's have the scientific name.

A. The *Crotalus Atrox*, Price's rattler, Willard rattler.

Q. No, let's have the scientific name.

A. I am not a scientist. My knowledge has been gained through observation.

Q. Then, you don't know the scientific name of any member of the *Crotalus* family, except the *Crotalus Atrox*, do you?

A. I do, yes sir.

Q. Do you know it to be true that there are, including South American and the Isthmus, only four different species of rattlesnakes altogether?

A. I believe that is just about right, yes.

Q. Now, as I understand it, you have never made any study of comparative anatomy in any institution of learning, have you?

[fol. 2257] A. I have not. I have dissected all of the anatomy. I have it in formaldehyde.

Q. And you have made no study in any institution of learning of the anatomy of the rattlesnake, have you?

A. Not except under my own observation.

Q. You know nothing of the anatomy of the rattlesnake's eye, except as you have observed rattlesnakes yourself, do you?

A. That is my knowledge, yes sir.

Q. When you said a while ago, that a rattlesnake would strike from almost any position, you never saw a rattlesnake lie on his back and strike upward, did you?

A. No, a rattlesnake doesn't lie on his back to start with.

Q. To that extent your answer was not quite accurate, was it?

Mr. Williams: You don't have to answer that question.

Mr. Clark: I insist on an answer. I expect to follow it up.

The Court: I think an answer is wholly unnecessary.

Mr. Clark: When you gave the answer that a rattlesnake would strike from almost any position, did you have it in your mind that a wound was under consideration here which had been made on the bottom of the toe of an individual?

A. I did not, no sir.

Q. A rattlesnake, in striking, necessarily has how many [fol. 2258] different kinds of movement?

A. I don't understand you.

Q. I say, when a rattlesnake strikes its victim, how many different kinds of movement does it make?

A. It merely strikes; that is all. It coils, ordinarily, if it has an opportunity. It may not coil or it may coil.

Q. If your rattlesnake coils then one kind of movement is the straightening out of the coil, isn't it?

A. O. K.

Q. In that it is very similar to the straightening out of a coiled metal spring, isn't it?

A. Yes, sir.

Q. It, however, must seize its victim with its mouth, mus-n't it?

A. Yes, sir.

Q. And after having done that it must clamp down with the fangs in order to eject the poison, mus-n't it?

A. Yes, sir.

Q. So that where the rattlesnake is coiled and strikes, there are always at least three movements on the part of the rattlesnake, aren't there?

A. There may be three or more.

Q. I say, at least three?

A. I wouldn't say that it is necessary to make three. I have been struck with just one.

[fol. 2259] Q. By a coiled rattlesnake?

A. Yes, sir.

Q. He didn't uncoil?

A. He didn't have a chance to. I had hold of him.

Q. You say you had hold of him?

A. Yes, sir.

Q. And you had hold of him?

A. Yes, sir.

Q. And he struck you?

A. Yes, sir.

Q. What were the effects of the wound, of the striking?

A. I opened it up and used a suction pump immediately, on it. There was some swelling and that is all there was to it. I used two tourniquets on my arm to overcome the bite.

Q. It made two punctures, didn't it?

A. It made one puncture on that occasion.

Q. Only one?

A. Yes, sir.

Q. And did it have two fangs?

A. If you would like me to, I will explain to you how that happened?

Q. I should be interested.

A. I was force feeding a Black Pacific rattlesnake, known as the *Crotalus Organus* and I had it lying on my lap and I was placing a small mouse down the snake's throat and I had hold of the back of his neck this way, and was pulling the [fol. 2260] skin up this way, and it wouldn't permit the mouse to go through, and I released my hold just a little bit and the snake turned around this way with one fang; I had released just enough so that he happened to put one fang in my finger. That is the way I happened to get bit.

Q. Now, it is true, is it not, that there are many different classes and species of rattlesnakes?

A. There are, yes, sir.

Q. That scientific authorities are not entirely in agreement as to how many different species there are; that is true, isn't it?

A. I think it is, yes.

Q. It is also true, is it not, that as to some varieties the re-

semblances are so close that some authorities may consider two snakes as belonging not only to the same species but to the same variety, while there are other authorities will believe that they are two distinct varieties?

A. There are some reptiles, some rattlesnakes, which cannot be mistaken, however.

Q. Did you ever hear of an authority named Vandenburg?

A. I have heard of the name. However, I don't know him.

Q. You have never read any scientific articles on rattlesnakes written by such an author?

A. No, sir.

Q. Did you ever hear of an authority on Herpetology, named Schmidt?

[fol. 2261] A. I don't think I have. I have done very little reading on those, Mr. Clark.

Q. Did you ever hear of a man by the name of Ditmars?

A. No.

Q. Or Klauber?

A. Yes, sir.

Q. You have heard of him?

A. Yes sir, I have heard of him.

Q. Have you read any of his writing?

A. Sir?

Q. Have you read any of his writings?

A. I haven't read any of his writing.

Q. You do not base any opinion you express here upon anything that you learned from Mr. Klauber, have you?

A. I have not.

Q. He was one of the curators of reptiles that you talked to?

A. Yes, sir, he was. He was introduced to me by Mr. Brewer, the President of the Los Angeles Zoological Society.

Q. Now, will you tell me whether or not a species or variety of rattlesnakes referred to as *Confluentus*—are you acquainted with that?

A. Yes sir, I am acquainted with the *Confluentus*.

Q. Is it a variety of *Crotalus*, is it not?

A. Sir?

Q. I say it is a variety of the species *Crotalus*?

[fol. 2262] A. It is a rattlesnake; that is the term.

Q. Is that—Is that a term applied, to your knowledge, to the Diamond Back rattlesnake?

A. No.

Q. I beg your pardon?

A. No, sir.

Q. Isn't it true that the herpetologist named L. M. Klauber, classified the Diamond Back rattlers that are found between San Diego and San Jacinto and in Lower California by that name?

Mr. Williams: I object to that question on the ground that there is no foundation laid and it is incompetent, irrelevant and immaterial.

A. No.

The Court: There is nothing to show that he is acquainted with that variety.

Mr. Clark: Your Honor sustains the objection?

The Court: Yes, upon that ground. It has not been shown that this witness ever heard of the person who wrote about this.

By Mr. Clark:

Q. Will you tell me if you know, whether or not the two rattlesnakes that you saw here in the courtroom, belonged to the variety of *Crotalus Atrox*?

A. They are *Atrox*.

Q. What is the difference between the *Atrox* and the other?

A. That snake is much larger and has no black rings on its tail.

[fol. 2263] Q. Which is larger, the *Atrox*?

A. Yes, sir.

Q. And it has no rings on its tail, you say?

A. Yes, sir.

Q. Although the other snake, *Crotalus Atrox* on the other hand is smaller, and does have rings on its tail?

A. It does have rings on its tail.

Q. This *Crotalus Atrox* does have, is that right?

A. Yes, sir.

Q. I beg pardon?

A. Yes, sir.

Q. And those are the distinguishing features between those two varieties?

A. There are markings also.

Q. All right; what are the distinguishing marks?

A. I am not an authority on the identification of the various snakes. I collected practically or possibly all of them in the United States and I have studied their habits and was interested in markings on the various species. I can identify them.

Q. Well, tell me—I am going to ask you one or two more questions along those lines—is there a variety known as *Lucasensis Ruber*?

A. They are commonly known as the Red Rug rattler. The coloration—

Q. Well, would you distinguish the one variety from the other? How could you do that?

[fol. 2264] A. The coloration for one thing.

Q. What is the difference in color between the two?

A. The coloration is a dark brick red.

Q. That is, you mean the *Lucasensis Ruber*?

A. Yes, sir.

Q. Now, tell me whether or not it is true that the color of any rattlesnake is considerably affected by its environment.

A. Yes, sir.

Q. As a matter of fact, all of the different varieties of rattlesnakes depends very much on the environment they are in?

A. That applies to all snakes.

Q. So without knowing the environment in which a rattlesnake lives, you will always have the doubt as to the variety without taking the color into consideration?

A. Yes.

Q. Now, isn't it true that you can tell by the shape of the snake as to the type of snake it is?

A. Yes, sir.

[fol. 2265] Q. What is the condition?

A. I don't know that, but I know the snake by the shape of the head, and the body of the snake.

Q. I believe you said a little while ago that the *Atrox* was larger than 60 inches. I wish you would tell me how large the smaller *Atrox* gets to be?

A. How large they get to be?

Q. Yes.

A. I have never measured them on a yard stick, or anything of that sort. I would say they get to be three and a

half or four feet long. I have an *Atrox* six and a half feet long, which I got in Texas.

Q. That is one that we may call a larger snake?

A. Yes, that is a large *Atrox*.

Q. How large is a *Crotalus Tortugensis*?

A. About three feet long.

Q. You have never seen one bigger than three feet in your life?

A. Three and a half is the biggest one I have ever seen.

Q. What variety of rattlesnake is indigenous to that portion of the Coast Range of California, consisting of the Western part of Arizona, also, and the eastern part of Monterey and San Benito Counties?

A. I didn't get your question.

Mr. Williams: The witness has said he did not get it?

Mr. Clark: If he doesn't know, he can say so.

[fol. 2266] A. There is the Black Pacific that I have in my office.

By Mr. Williams:

Q. Are they a large variety? Is that a large variety?

A. They run about four or five feet long.

Q. Do they ever get above six feet long?

A. I have never seen one. I have one here in a jar that is about five and a half feet long.

Q. Isn't it true that the snakes of that origin——

A. I beg your pardon?

Q. Isn't it true that snakes of that type have been found more than 74 inches long?

A. Not by me.

Q. You never caught snakes over there, did you?

A. No.

Q. Now, is there also a variety known as—pardon my pronunciation, but is there a type called “*Tortangus*”?

A. I have heard of that.

Q. That is somewhat closely related to the *Atrox*?

A. By the scientific name I couldn't tell you.

Q. Do you know what the difference is between these two varieties of snake?

A. Not unless I saw the snake.

Q. Now, I have just three or four more questions that I would like to ask you. Now, rattlesnakes coil. That is

simply for the purpose of delivering the blow with greater force, and at a greater distance from the central area?

[fol. 2267] A. If it is placing itself in the position to strike. Otherwise, the snake always lies in a coiled position.

Q. You say it always lies in a coiled position?

A. When it is sleeping.

Q. A snake very frequently stretches out to take a sun bath?

A. They don't stay in the sun very long. The sun will kill them.

Q. But they do take a sun bath?

A. Yes, they do take a sun bath.

Q. It is somewhat difficult to measure them, isn't it?

A. Yes.

Q. Now, there is nothing in the coiling of the rattlesnake necessary if they want to strike?

A. I have seen a rat jump over the top of the snake, and he turned this way and bit the rat while the rat was passing over the top of him.

The Court: You mean when he was coiled?

A. Yes, when he was coiled.

By Mr. Clark:

Q. And in that case did he seize the rat with the whole of his mouth, take him right into his mouth?

A. No, he merely fastened on to the rat for about 15 seconds.

Q. Do you know what part of the rat's body the fangs penetrated?

A. I should judge it struck him right back of the ear.

[fol. 2268] Q. Have you ever seen a cat and rattlesnake striking at each other?

A. The cat is usually the winner of the fight.

Q. I beg your pardon?

A. The cat is usually the winner of the fight.

Q. Well, the cat strikes out more rapidly?

A. I would say that the rattler strikes the fastest.

Mr. Clark: That is all.

The Court: We will take our morning recess at this time.

The jury will remember the admonition. We will take a short recess.

(Recess.)

The Court: Let the record show all parties present.

By Mr. Williams:

Q. Mr. Scobie, you spoke of——

Mr. Clark: Pardon me.

Mr. Williams: Hadn't you finished?

Mr. Clark: I hadn't quite finished, no.

Mr. Williams: Oh, I am sorry. I thought you had.

Mr. Clark: If your Honor please, at this time, so that I may not forget it, I desire to offer in evidence in connection with the testimony of Dr. Weinberg those additional portions of the bulletin of Dr. Klauber, which bulletin was filed and marked as Exhibit G. In other words, two certain paragraphs having been offered——

The Court: There have been no paragraphs offered, Mr. Clark. It was marked for identification merely because [fol. 2269] it had been used in questioning the witness, but nothing was offered into evidence, nor was anything read into the record from the document.

Mr. Clark: I shall have to——

The Court: Produce the record on me, if you think I am wrong.

Mr. Clark: No, I won't say the record shows it. I thank your Honor for expressing the view that the record does not show it, but in view of your Honor's remarks I would like to drop the subject now, and as soon as this witness leaves, or at some convenient time, I would like to call Mr. Weinberg and make the record show what your Honor says is lacking now, unless Mr. Williams wishes to stipulate.

The Court: My recollection is that Mr. Williams used the document for the purpose of cross examination.

Mr. Clark: Yes, and in doing so I expect to show that he read from the document, and after showing that I want to introduce the rest of the document, so that the portion that he read from can be better understood.

The Court: The method of doing that would be to recall the witness who was questioned in regard to it, and ask him whether he was also aware of the fact that the same document said so and so, and so and so. In other words, the

question was directed not as to what was in the publication, but as to what the witness knew on the subject. Permitting it to be marked for identification is not any intimation in the slightest degree as to its admissibility. My thought has always been that anything that has been used in the courtroom should be marked for identification.

Mr. Clark: I was under the impression that Mr. Williams had read from it, and that the familiar rule could be invoked that the part of the written instrument having been placed in evidence, that the remainder of the instrument is available.

The Court: I don't think you are applying the rule in a proper instance, Mr. Clark. It is quite common in the examination of an expert to say, "Do you know that such and such an authority says this or that?"

Mr. Clark: The Court will recall that when these questions were asked he was not asked if he didn't know generally that Dr. Klauber said certain things, but he was asked if he didn't know that Dr. Klauber said certain things in a certain bulletin, at a certain page.

The Court: That was true. He was asked whether he knew that Dr. Klauber had said certain things. That is preliminary to asking him if he took that into consideration in arriving at his conclusion.

Mr. Clark: And over my objection Dr. Weinberg was compelled to say that he knew that in that particular document Dr. Klauber did say those things which Mr. Williams, by reading, attributed to him.

The Court: I think you are misconceiving the suggestion. [fol. 2271] Let's take another analogy. Suppose a witness on the stand has made a lengthy dissertation on a certain subject matter. He is asked, "Didn't you at that time say so and so?" That would not permit the introduction of the document. He was asked what he based his opinion on. He said on experience and reading. Then he was asked if that was one of the things he took into consideration, and he said "Yes." I think if you want to get in that there are other matters that he took into consideration in reaching his opinion, I will permit you to recall him. I can see no objection to that, but I don't think it admits the entire bulletin in evidence because a question has been asked from that bulletin.

Mr. Clark: Well, I will examine the state of the record

during the noon recess, and take such course in the afternoon as I may be advised. I simply didn't want to close the cross examination of Mr. Scobie before taking this matter up with Mr. Williams. In view of the ruling that the Court has now made, I don't think I care to ask Mr. Scobie any further questions at this time.

Redirect examination.

By Mr. Williams:

Q. Mr. Scobie, I have before me here a glass jar containing a dead snake, and I will ask you what variety that snake is?

[fol. 2272] Mr. Clark: That is objected to on the ground it is not redirect examination, and that it is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Clark: May I further add to the objection that the witness is not competent to express an opinion?

The Court: The direct examination of this witness related to the type referred to as *Crotalus Atrox*. Mr. Clark went into a large number of varieties, which had not been mentioned on direct examination.

Mr. Clark: For the purpose of testing the competency of the witness, to show that he couldn't distinguish between one variety and the other.

The Court: That is true, and since you have adopted that line of cross examination, which was not gone into on direct examination, this may be gone into.

A. That is *Crotalus Atrox*.

By Mr. Williams:

Q. Is that a snake which belongs to you?

A. Yes, sir.

Mr. Clark: May I preserve my objection throughout, that the evidence is incompetent, irrelevant and immaterial, and that no foundation has been laid for it, and that it not only has not been shown that the witness is competent to express an opinion, but it has appeared affirmatively that he is not so competent?

The Court: Objection overruled.

[fol. 2273] Mr. Clark: It will be understood that I am in-

sisting on that objection throughout the further examination of the witness?

The Court: Yes.

Mr. Williams: May this be referred to as People's Exhibit 76 for identification?

The Court: 76.

By Mr. Williams:

Q. I observe, by referring to the snake in this jar, People's Exhibit 76 for identification, that the mouth is open, and that what appears to me to be fangs, and the tongue, and the entire interior of the mouth are exposed? That is correct, is it?

A. Yes, sir.

Q. Is that a typical mouth of a *Crotalus Atrox* when it is open?

A. No, sir, it is not.

Q. In what particular isn't it?

Mr. Clark: That is objected to upon the additional ground that it not being a typical mouth, it is immaterial how this varies from it.

The Court: The objection is a premature objection, until we know the differentiation.

Mr. Clark: May it appear now that I object to the further interrogation of the witness concerning an object not introduced in evidence, except insofar as such interrogation is necessary to lay a foundation?

[fol. 2274] The Court: I am assuming that these questions are for the purpose of laying a foundation.

Mr. Clark: The question that has been asked seems to have no tendency that way.

The Court: The best answer to that, Mr. Clark, is your own objection. If it were so far from being a typical mouth so as to have no value as evidence, the Court would exclude it. If the difference between this and a typical mouth were some immaterial feature, the ruling might be otherwise.

Mr. Clark: I think that answer should conclude the matter.

The Court: Not at all, Mr. Clark. For example, just as illustration, there might be a slight niche on one of the teeth; that would not be typical of *Crotalus Atrox*. That wouldn't exclude it.

Mr. Clark: Since that is your Honor's view, I must submit with the best grace I can, and do submit, if not with grace, at least wholeheartedly, having in mind, your Honor, that the County jail is not comfortable at this time of year.

The Court: Well, there is no danger of you being accused of any contempt of court. I don't know of any person who has a higher respect for courts than you have, but courts can't always agree with counsel. The objection is overruled. You may answer.

By Mr. Williams:

Q. In what respect does this mouth differ from a typical mouth of *Crotalus Atrox*?

Mr. Clark: That is objected to.

[fol. 2275] The Court: I have already overruled the objection.

A. I placed this snake in formaldehyde after rigor mortis had set in, and there wasn't room enough to open the mouth as it would be if the snake were in a biting position. I just opened it to show the fangs.

By Mr. Williams:

Q. In other words, if the snake were alive and in a biting position, the mouth would be further open?

A. The upper portion would be back farther.

Q. The upper portion of the head being hinged so that it does raise back?

A. In other words, if the mouth were entirely open, and the snake were alive, the fangs would naturally come out.

Mr. Barnes: Mr. Williams, some of the jurors can't see the exhibit the way you are standing.

The Court: With all respect to the jury, I don't think it is necessary. The exhibit is not yet in evidence.

Mr. Williams:

Q. Are the fangs, and tongue, and mouth typical of *Crotalus Atrox*?

A. Yes, sir.

Mr. Clark: We, of course,—

The Court: Same objection and same ruling.

A. Yes, sir.

Mr. Williams: Now, if your Honor please, at this time, for the purpose of illustration only, I offer People's Exhibit 76 for identification in evidence, and ask that the jury [fol. 2276] be permitted to examine it for the purpose of seeing matters that were shown by the exhibit.

Mr. Clark: We object to it upon the ground that it is incompetent as evidence in this case, that no foundation has been laid for its introduction, and that it does not relate to, and is not relevant to any of the issues, throws no light upon any question of fact which is involved.

The Court: The objection will be overruled, and just for the purpose of the record I may say that it certainly is relevant and responsive to the introduction in evidence by the defense of Exhibit E, which also is the head of a dead rattlesnake.

Mr. Clark: Exhibit E was introduced simply as an illustration.

The Court: Mr. Clark, this is only received for the purpose of illustration.

Mr. Clark: What does it illustrate?

The Court: I don't want to comment on a question of fact.

Mr. Clark: I beg your Honor's pardon. I shouldn't have asked that question.

The Court: I may answer it by saying it would probably illustrate the same thing your Exhibit E illustrates.

Mr. Clark: May I apologize for asking the question? I didn't manifest the respect that I should manifest for the Court, and I feel that the question addressed to your Honor was improper and so I apologize.

[fol. 2277] The Court: There is no occasion for it. I would not have noticed it if you hadn't mentioned it.

Mr. Williams: May I exhibit this to the jury?

The Court: It may be that the jury will not desire to handle the exhibit, even in the jar. I think you might give the jury an opportunity to examine it.

Mr. Clark: May I make this suggestion, your Honor?

The Court: Yes.

Mr. Clark: Of course, when it comes to a matter being received in evidence, if I have any question as to its admissibility, my duty is to object. After it is received in evidence I have no right to do anything other than to facilitate its proper use. Therefore, since it is received in evidence, and is proper for the jury to examine, why would it not be as well to place the jar here upon the railing, withdraw

the witness from the stand temporarily, and let such of the jurors that care to examine it, come down and look at it?

The Court: I think that is a good suggestion, except we might do it after the witness has left the stand, at the end of his examination.

Mr. Clark: I have no desire whatever as to when it be done, your Honor.

Mr. Williams:

Q. Now, you said in your direct examination, and also on cross examination, that you had in your possession in the courtroom a snake of the *Crotalus Atrox* variety, which [fol. 2278] you had had in captivity for more than a year?

A. Yes, sir.

Q. Is that the snake here in the courtroom?

A. Yes, sir.

Q. Will you bring it up here?

A. Do you want the box, or the snake?

Q. The box with the snake in it. Don't take the snake out of the box. Now, this box that you have just produced with the screen top contains the snake to which you referred in your testimony, does it?

A. Yes, sir.

Mr. Williams: We offer it in evidence as People's Exhibit No. 77 at this time.

Mr. Clark: To which we object on the ground that the evidence is incompetent, irrelevant and immaterial, does not tend to prove any fact in this case, and that no foundation has been laid for its introduction, that branch of the objection being based upon our contention that the witness upon the stand has not been shown competent to identify the species or variety of the snake.

The Court: Not upon that ground, necessarily, but upon a ground which may be somewhat original; I don't know any precedent for it; I am willing to take steps toward creating the precedent, if necessary. I am going to sustain the objection. My reason for sustaining the objection is that the exhibit is not one which the jury could examine [fol. 2279] in a manner which would enable them to gain any fair or accurate information. The nature of the exhibit is such that the examination naturally could not be made by the jury, and it might be even possible that a misunderstanding might be created by receiving this particular

exhibit in evidence, it being offered merely for the purpose of illustration, if admissible at all. The objection will be sustained.

Mr. Williams:

Q. Now, on cross examination you were questioned with reference to a character of snake which was called the *Crotalus Organus*, or the Black Pacific rattler. I show you now a jar which I will ask permission to refer to as People's Exhibit No. —

The Court: 78.

Mr. Williams: —78 for identification, and I will ask you whether or not that contains a snake which is of the type known as the *Crotalus Organus*, or Black Pacific rattler?

Mr. Clark: At this time, your Honor, I again direct your attention to the fact that without stating it I am relying on the same objections heretofore interposed. [fols. 2280-2291] The Court: The same objection will be assumed and the same ruling. Objection overruled.

By Mr. Williams:

Q. And is that snake a snake typical of the variety known as the *Tortugensis Atrox*? I observe that this mouth—as far as the interior of the mouth is concerned is it a typical mouth?

A. Yes, sir.

Q. Is that the type of snake that bit you?

A. Yes, in fact that is the snake that bit me.

Mr. Williams: We offer it in evidence.

Mr. Clark: To which we object upon the ground——

The Court: The objection is sustained.

Mr. Williams: That is all; I have no further questions.

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[fols. 2292-2310]

STIPULATION

Mr. Parsons: I understand, Mr. Williams, that you will stipulate that if the Court Reporter who took the proceedings at the Inquest, that he would testify that he took down the following, that his notes showed the following: "Q. What was the condition of her health? A. She was anemic,

that is what the doctor said and being pregnant she was subject to these dizzy spells.

Q. Had she told you of any fainting spells that she had?
A. Yes, and every thing she would eat would nauseate her and she just felt miserable. She was sick. She said, 'I don't know whether I am sitting in this room or the next one I just feel so miserable'."

Mr. Williams: So stipulated.

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[fol. 2311] IN SUPERIOR COURT OF LOS ANGELES COUNTY

MINUTE ENTRY—May 6, 1936

Convened at 9:30 A. M., Present: Hon. Thomas L. Ambrose, Judge; E. C. Averre, Deputy Clerk; J. A. Dixon and H. K. Egley, Deputies Sheriff; J. E. Noon, Reporter (9:30 A. M. to 4:30 P. M.) and the following proceedings were had:

In re Return of the Grand Jury

Comes now the Grand Jury into Court, 19 Members being present.

District Attorney Buron Fitts, Deputy District Attorney E. D. Williams and Deputy District Attorney U. U. Blalock also present.

The following Indictments are presented in open Court by George Warren, Foreman of the Grand Jury, in the presence of the Grand Jury and ordered filed, to-wit:

• • • • •

64218

Major Raymond Lisenba, Charles H. Hope. Bench Warrants issued. No bail for either Defendant.

[fol. 2312] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

INDICTMENT. MURDER

The said Major Raymond Lisenba and Charles H. Hope are accused by the Grand Jury of the County of Los An-

geles, State of California, by this Indictment, of the crime of Murder, a felony, committed prior to the finding of this Indictment, and as follows:

That on or about the 5th day of August, 1935, at and in the County of Los Angeles, State of California, the said defendants, Major Raymond Lisenba and Charles H. Hope did willfully, unlawfully and feloniously and with malice aforethought, murder one Mary Emma James, a human being.

Witnesses examined before the Grand Jury:

Charles H. Hope.
Mrs. Charles H. Hope.
Major Raymond Lisenba.
Jou Houtenbrink.
Mike Allman.
Madge Reed.
Jack Southard.

[fol. 2313] (Endorsed:) No. 64218. In the Superior Court of the County of Los Angeles, State of California. The People of the State of California, Plaintiff, versus Major Raymond Lisenba and Charles H. Hope, Defendants. Indictment. A true bill. Geo. B. Warren, Foreman of the Grand Jury.

Presented by the Foreman of the Grand Jury, in the presence of the Grand Jury, in open Superior Court of the State of California, within and for the County of Los Angeles, and filed as a record in said Court this sixth day of May 1936. L. E. Lampton, Clerk. By E. C. Averre, Deputy Clerk. Buron Fitts, District Attorney. By Eugene D. Williams, Deputy. B. W. issued. No bail.

[fol. 2314] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

MINUTE ENTRY—May 6, 1936

District Attorney Buron Fitts, Deputy District Attorney E. D. Williams and the Defendant Major Raymond Lisenba with his counsel, S. J. Silverman, and Defendant Charles

H. Hope without counsel, present. The Public Defender is appointed by the Court as attorney for Defendant Charles H. Hope.

Both defendants are duly arraigned, each states his true name to be as charged in the Indictment, waives reading of the Indictment and on motion of said defendants, the time to plead is continued to May 11, 1936 at 9:30 A. M.

[fol. 2315] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

MINUTE ENTRY—May 11, 1936

Deputy District Attorney A. S. Colgrove, Deputy District Attorney E. D. Williams, Defendant Major Raymond Lisenba with his counsel, S. J. Silverman and Defendant Charles H. Hope with his counsel, Deputy Public Defender William H. Sanson, present.

Each defendant regularly enters his plea of "Not Guilty as charged in the Indictment" and Defendant Major Raymond Lisenba also enters his plea of "Not Guilty by Reason of Insanity" because he was insane at the time that he is alleged to have committed the unlawful act.

Doctors Edwin Wayte, Paul E. Bowers and Ross Moore are appointed under Section 1027 Penal Code to examine Defendant Major Raymond Lisenba as to his mental condition.

The trial of the action is thereupon set for June 22, 1936 [fol. 2316] at 9:30 A. M. and transferred to Department 43, each defendant waiving the statutory period.

Defendant Major Raymond Lisenba's motion for severance is set for hearing by the Court on May 19, 1936 at 2:00 P. M.

[fol. 2317] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

ORDER DENYING MOTION FOR SEVERANCE—May 19, 1936

Deputy District Attorney E. D. Williams and Defendant with his counsel, S. J. Silverman, present.

Motion for severance is denied by the Court.

[fol. 2318] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Titles omitted]

MINUTE ENTRIES OF TRIAL—Monday, June 22, 1936.

Cause is called for trial.

Deputy District Attorneys Eugene D. Williams and John Barnes, and the Defendant with his counsel, Samuel J. Silverman, R. E. Parsons and William J. Clark, present.

The Jury is in the process of impanelment. Prospective Jurors are admonished and trial is continued to June 23, 1936.

[fol. 2319] Tuesday, June 23, 1936.

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Trial is resumed.

Deputy District Attorneys Eugene D. Williams and John Barnes, and the Defendant with his counsel, Samuel J. Silverman, R. E. Parsons and William J. Clark, present.

The following Jurors are sworn to try the cause:

Ethel Sherman	Hollis M. Wade
Ralph May	Sherwood W. Whitchee
William Wilcox	Ollie Sye
Wiley B. Darnell	Thomas R. Webb
Frank T. Allen	Harry M. Gray
Harold W. Hart	Fred Sheridan

The following alternate Jurors are impaneled and sworn:
Albert A. Gad and Samuel Gilliam.

The Indictment is read and pleas stated.

The Court orders a daily transcript of the testimony.

Fred C. Kohl is sworn and testifies on behalf of the People.
[fol. 2320] The Jury and alternates are admonished, and trial is continued to June 24, 1936.

[fol. 2321] Wednesday, July 15, 1936.

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Trial is resumed.

Deputy District Attorneys Eugene Williams and John Barnes and the Defendant with his counsel, S. J. Silverman,

W. J. Clark and R. E. Parsons, present. It is stipulated the jury and alternate jurors are all in attendance.

Dr. Frank Weinberg and Lewis Berry are recalled and Major Raymond Lisenba alias Robert James is sworn and all testify on behalf of defendant.

People's Exhibits Nos. 1 (Diagram), 2 (Diagram), 3 (Note), 4 (Letter and Envelope), 5 (3 Cards-Exemplars), 6, 7, 8 and 9 (Each a Photo), 10 (Coil of Chicken Wire), 11 (Lot of Rope-Sash Cord), 12, 13 and 14 (Each a Photo), 15, 16 and 17 (Each a Blanket), 18 (Snake Venom-Cup), 19 (Box-Snake Fangs), 20 (2 Rattlesnakes), 21 (Application [fol. 2322] for Insurance), 22 (Insurance Policy), 23 (Application for Insurance), 24 (Application to Insurance), 25 and 26 (Each an Insurance Policy), 27 to 38 (Each a Photo), 39 (Diagram-Chalk), 40 to 49 (Each a Photo), 50 (Photostat of Letter), 51 (Diagram-Chalk), 52 to 56 (Each a Photo), 57 (Letter and Envelope), 58 and 59 (Hospital Records), 60 and 61 (X-Rays), 62 (Photostat.—Policy and Application), 63 and 64 (Proof of Death), 65 (Check), 66 and 67 (Application for Insurance), 68 and 69 (Policy of Insurance), 70 (Release), 71 (Policy-Photostat.), 72 (Proof of Claim-Photostat.), 73 (Reg. Card-Hotel), and 74 (Calling Card) are filed.

The Jury is admonished and trial is continued to July 16, 1936.

[fol. 2323]

Thursday, July 16, 1936

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Trial is resumed.

Deputy District Attorneys Eugene D. Williams and John Barnes, and the Defendant with his counsel, S. J. Silverman, W. J. Clark and R. E. Parsons, present.

It is stipulated the Jury and alternates are all present. Testimony of Major Raymond Lisenba on behalf of the defendant is resumed. Charles H. Hope is recalled by the Defendant. The following witnesses are sworn and testify on behalf of the Defendant: James DeWitt George, Scott Littleton, and Ray O'Brien. Defendant rests.

Defendant's Exhibits A (Drawing), B (Affidavit, for identification), C (Wooden Box, for identification), D (Wooden box), E (Snake's Head), F (Diagram-Skull), G (Phamphlet, for identification) and H, I and J (Each a Photo) are filed.

[fol. 2324] People's Exhibit No. 75 (Exhibit A—Civil Case No. 392270) is admitted by reference only.

Robert F. Herron, Edward Lynch and A. Pierce Artran are sworn and testify in rebuttal on behalf of the People.

The Jury is admonished and trial is continued to July 17, 1936.

[fol. 2325] Friday, July 17, 1936

Deputy District Attorneys Eugene Williams and John Barnes, Defendant Lisenba with his counsel, S. J. Silverman, R. E. Parsons and W. J. Clark, and Defendant Hope with his counsel, Deputy Public Defender E. E. Cuff, present.

On motion of Defendant Hope the pronouncing of judgment and sentence as to himself is continued to July 24, 1936.

Trial is resumed as to Defendant Lisenba.

It is stipulated that the Jury and alternates are all present.

The following persons are sworn and testify on behalf of the People in rebuttal: Doctor A. F. Wagner, Jack Southard, Carl H. Scobie and Mrs. Viola Pemberton. People rest. People's Exhibits Nos. 76 (Snake in jar), 77 (Rattlesnake), [fol. 2326] for identification, 78 (Snake in jar) for identification are filed. People rest.

Doctor Frank Weinberg is sworn and testifies on behalf of people in surrebuttal. Defendant rests.

Defendant's Exhibit K (Photographic reproduction of People's Exhibits Nos. 39 and 51) is filed.

Cause is argued, and continued to July 20, 1936. Jury is admonished and trial is continued to July 20, 1936.

[fol. 2327] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

VERDICT—July 24, 1936

Trial is resumed.

Deputy District Attorneys Eugene D. Williams and John Barnes, and defendant with his counsel, S. J. Silverman W. J. Clark and R. E. Parsons, present.

It is stipulated that the Jury and alternates are all present. The Court instructs the Jury. The Sheriff is sworn

to take charge of the Jury, which retires at 10:56 A. M. to deliberate. At 12:10 P. M. the Jury is taken to lunch with the bailiff in charge, returning at 1:30 P. M. for further deliberation. At 6:00 P. M. the Jury is taken to dinner with the bailiff in charge, returning at 7:10 P. M. for deliberation, and returning into Court at 8:10 P. M. with the following verdict:

[fol. 2328] Title of Court and Cause |

"We, the Jury in the above entitled action, find the Defendant Guilty of Murder, a felony, as charged in the Indictment, and find it to be Murder of the First Degree." This 24th day of July, 1936.

F. T. Allen, Foreman.

The Jury is polled and each answers in the affirmative. Verdict and instructions are filed. Alternate jurors are excused.

The pronouncing of judgment and sentence is set for July 28, 1936, at 10:00 A. M. Defendant is remanded.

[fol. 2329] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

VERDICT—Filed July 24, 1936

We, the Jury in the above entitled action, find the Defendant guilty of Murder, a felony, as charged in the Indictment, and find it to be Murder of the First Degree. This 24th day of July, 1936.

F. T. Allen, Foreman.

[File endorsement omitted.]

[fol. 2330] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

MINUTE ENTRY—July 28, 1936

Deputy District Attorneys Eugene D. Williams and John Barnes, Defendant Lisenba with his counsel, S. J. Silverman,

W. J. Clark and R. E. Parsons, and Defendant Charles H. Hope with his counsel, Deputy Public Defendant William B. Neeley, present.

By leave of Court Defendant Lisenba withdraws his plea of "Not Guilty by Reason of Insanity" and moves orally for a new trial. The hearing on said motion is continued to September 8, 1936, at 10:00 A. M. Defendant Lisenba is remanded.

The Court now orders the Reporter to transcribe the argument of the Deputy District Attorney, copies to be given the District Attorney and counsel for the Defendant.

No legal cause appearing why judgment should not be [fol. 2331] pronounced, the court pronounces judgment and sentence as to Defendant Hope as follows: Defendant is sentenced to the California State Prison at Folsom for the term prescribed by law. This sentence is entered in Judgment Book No. 32, Page 148.

Defendant Hope is remanded.

[fol. 2332] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

AFFIDAVIT OF R. E. PARSONS—Filed August 8, 1936

STATE OF CALIFORNIA,

County of Los Angeles, ss:

R. E. Parsons, being first duly sworn, and upon his oath, deposes and says: That he is one of the attorneys in the above entitled matter and that as such he was present during the course of the trial of the above named defendant in Department 43 of the above entitled court and that upon one occasion during the course of the trial, and while testimony was being taken, affiant heard a commotion in the rear of the court room and upon looking up saw one of the investigators of the District Attorney's office of this County, and who had been working in and upon the preparation of this case and who, from time to time had been sitting at the counsel table during the trial of this case, entering the court room with another gentleman and the two of them were carrying a box which box was approximately a foot square and about five feet long and one side was made of glass so

that upon looking into the glass one could see the entire in-[fol. 2333] side of the box, and there within the box, were two live rattlesnakes commonly known as "diamond back", and affiant could hear the rattle of these snakes, notwithstanding the proceedings within the court room were then actually being carried on, as these men entered the court room with the box containing the two live rattlesnakes.

That there was considerable commotion within the courtroom and affiant as he turned about the courtroom, saw numerous people partially arising from their seats and looking in the direction of the two men who were carrying the box of live rattlesnakes within the courtroom; that affiant could hear numerous comments made by persons within the court room which remarks were, however, made in an undertone and affiant could not tell exactly what the spectators within the courtroom said, but affiant noticed the jury, immediately upon the entering of the courtroom by the District Attorney's investigator and the other man, who were carrying the box of live rattlesnakes directed their attention from the actual proceedings then taking place within the courtroom, and the eyes of the jurors were immediately centered upon the two men who were entering the courtroom with the box of rattlesnakes; that the box of rattlesnakes was taken to a position in the courtroom immediately behind the clerk's desk and the box was set down and at a later time this same box of rattlesnakes together with the two rattlesnakes therein contained, was offered in [fol. 2334] evidence by the People over an objection of the defendant, and thereupon said box of rattlesnakes, with the glass portion thereof turned toward the jury, was placed upon the counsel table at a position approximately four or five feet from the front of the jury box, and affiant noticed that the attention of the jury was thereupon attracted to and centered upon the said live rattlesnakes which were then contained in said box and which were exhibited to the jury as aforesaid.

That during the course of the trial a letter was received eventually by affiant, as one of counsel for the defendant, from a man by the name of — which letter was offered in evidence by defendant in support of a motion by the defendant for a continuance, this letter indicating that this man had seen the defendant and his wife, Winona, at Pike's Peak upon the day and immediately before the automobile accident upon Pikes Peak in which Winona James, a former

wife of the defendant, suffered severe injuries and which evidence of the accident was offered by the District Attorney in support of their contention that Winona James, a former wife of the defendant was murdered by the defendant, and the letter from Mr. — was to the effect that he had seen Winona James and her husband immediately prior to the happening of the accident and that they were at that time not under the influence of intoxicating liquor.

[fol. 2335] That affiant, while in the course of the trial, came into possession of a copy of "Liberty Magazine" of the date of July 25, 1936 which magazine was for sale upon the news stands of the City of Los Angeles and was offered for sale during the course of this trial at the very entrance of the Hall of Justice within which building the courtroom within which this trial was occurring, was actually situated, and it would have been necessary, and was necessary, for members of the jury as they passed to and from the building, to pass by news venders who were actually selling said issue of Liberty Magazine there and upon the cover of said magazine was the following: "The Strangest Crime Los Angeles Ever Knew—Detective Littleton tells the inside story of the Snake Man's Wife Murder".

That commencing on page 16 of the said issue of said issue of Liberty Magazine was an article headed "Death At the Lily Pond" "The Strangest Crime Los Angeles Ever Knew. Reading time 35 minutes 15 seconds. The lily pond. Beside it Mary Busch James was found lying dead." And upon page 16 of the said Liberty Magazine the following is found set up in the center of the page in large type: "The astonishing inside story of the Snake Man's Wife Murder—by One of the Detectives who 'Broke' the case—Scott Littleton Staff Investigator for the District Attorney of Los Angeles County". That the said Scott Littleton referred to was one and the same person as Scott Littleton, [fol. 2336] one of the investigators of this case who actually worked upon the preparation of this case and for the greater portion of the trial sat at the counsel table beside the District Attorney's Deputies prosecuting the defendant.

That among other things the said article recited the following: (page 20 of said Liberty Magazine) "Meanwhile we went around and around with him about the death of his wife. For nearly sixty hours we kept him awake, taking turns questioning him", this referring to the questioning of the defendant immediately after his arrest and the testi-

mony elicited from the officers upon the stand indicated that the defendant had been arrested on Sunday the 19th at about 9 or 10 A. M. and had actually been booked in the County Jail on Tuesday the 21st at about 9 to 10 A. M., being approximately 48 hours, and there was some testimony by an investigator that James slept in a chair starting at about 3 o'clock Tuesday morning, the 21st.

It would appear from the article in Liberty Magazine that James was actually "kept awake", his inquisitors taking turns questioning him for nearly 60 hours, this statement being by an investigator of the District Attorney's office of Los Angeles County who had actually worked upon the case and this statement in Liberty Magazine to the effect that the defendant James was kept awake for 60 hours was at variance with all of the testimony given by the investigators to the effect that he had been kept awake for [fol. 2337] only 48 hours, and that then he had been permitted to sleep some.

That during the course of the trial the defendant Hope denied that he had ever discussed his proposed testimony with any person, and the article in Liberty Magazine recites as follows (page 20): "I have arrested quite a few people for major felonies. Hope, I could tell, was just made to order for us. 'James certainly puts you in the middle', I said. 'He's spilled the works to us, but I'm damned if you look like that kind of a guy.' Would he take the bait? I held my breath. 'I had nothing to do with it', he said, with strong emphasis on the 'I'. *We had our man!*" "You mean *he* did the whole thing?" I asked in a tone of disbelief. 'Don't give me that—you were in it right up to your neck with him.' 'I wasn't, I tell you. He did it all.' "Snakes—and everything?" Southard ventured (Southard was the man actually in charge of the investigation for the District Attorney). 'He told me he wanted them to fight. He told me he was going to have snake-fights and invite his friends.' 'So James *is* telling us the truth when he says you got them for him?' 'Yes,' he said, 'I got them for him but I didn't know what he was going to use them for. He had me hypnotized, I tell you!'

"'He had you cut in on the insurance,' Southard said. -Don't try to kid us. We've got the whole story.' 'I'm not. So help me God, all I did was help carry her out after [fol. 2338] she was dead. He made me do it, so help me!'

'You didn't have a thing to do with drowning her?' 'Not a thing! *He* did that, I swear to you he did!'

'A confession? Of course it was. A partial one, anyhow. The thing was to get him back to town, go to work on him, and get it all down in black and white before the newspaper storm broke. On the way we tried to get over to him the idea that the more he talked the better his chances would be of escaping the rope. By the time we reached the Hall of Justice he said he was all set to shoot the works with us.

'We bought him a meal, then joined District Attorney Fitts, Deputy District Attorney Williams, and Chief Plummer. Assistant Chief Griffen (Deputy Chief Griffen was one of the investigators who had James in custody and questioned him for many hours immediately after his arrest) and a stenographer were there and we got right down to business. At three o'clock the following morning we had dug out of Chuck Hope, ex-sailor and floor finisher, a story that Poe might have imagined.'

Later on in said article, on page 21, among other things this is written by Littleton, the author of the article: "'Did you believe that?' asked Captain Plummer (referring to a conversation with Hope). 'Of course not' said Hope. I thought he was kidding, but I was broke and almost any kind of a proposition looked good to me.'

[fol. 2339] That none of counsel for defendant had the slightest inkling that such an article had ever been written and submitted to any magazine or they would have prepared to take depositions so that the original manuscript of the article might have been presented to the Court, and affiant first learned of the existence of such an article when he saw the July 25th, 1936 copy of Liberty Magazine. That as has been indicated, there are numerous matters set forth in said story in Liberty Magazine of such a nature as to constitute important evidence to the cause of defendant and said matters as related in said article written by Scott Littleton, District Attorney's investigator, are directly opposite to sworn evidence given upon the trial of this case and it would have been, and was, and is important to the cause of the defendant that the evidence as set forth in said article submitted to the editors of Liberty Magazine, could have been presented to the Court.

That affiant talked with a great many persons during the course of the trial who reminded affiant of the existence of this story in Liberty Magazine and that they had read the

same, and it would appear that Liberty Magazine did at the time of the sale of this particular issue, have a tremendous sale within the City of Los Angeles, of many thousands of copies, and that Liberty Magazine is one of the leading national weekly magazines, widely read, and that said article so published in said magazine during the course of [fol. 2340] this trial could only have had an effect upon members of the jury prejudicial to the cause of the defendant.

R. E. Parsons.

Subscribed and sworn to before me this 8th day of August, 1936. H. Y. Gibson, Notary Public in and for the County of Los Angeles, State of California.
(Seal.)

[fol. 2341] (Endorsed:) Received copy of the within Affidavit this 8th day of August 1936. Buron Fitts, D. A., by A. Schweitzer, Attorney for Plaintiff

[File endorsement omitted.]

[fol. 2342] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

AFFIDAVIT OF WM. J. CLARK—Filed August 8, 1936

STATE OF CALIFORNIA,

County of Los Angeles, ss.:

WM. J. CLARK, being first duly sworn, deposes and says: I am one of the attorneys for the defendant and was one of the attorneys that represented him at the trial of the above entitled cause. There was a strong public sentiment against him before the trial commenced. It was so strong that serious consideration was given to the question as to whether a motion should be made for a change of venue. When a jury was selected I suggested to Hon. Chas. W. Fricke that the jury be locked up during the trial but it was not so ordered and the jurors were not removed from contact with the public nor prevented from reading the papers except that they were admonished not to do so.

All the daily papers, of which there were four, namely, the News, the Times, the Herald and the Examiner, carried daily stories unfavorable to the defendant and each day the court room was filled with an unfriendly audience, while [fol. 2343] from twenty to sixty persons were waiting in the corridors almost throughout the trial.

There was the testimony of one Charles Hope that he had procured rattlesnakes at the solicitation of the defendant and the latter had thrust his wife's foot into a box containing one of them. As the testimony of said witness appears at length in the reporter's transcript it is not deemed necessary to quote from it here. He did say, however, that the snakes were returned to the man from whom he bought them.

On the 29th day of June the District Attorney, acting through his deputies Eugene Williams and John Barnes, committed such misconduct as inflamed the passions of the jurors against this defendant and prevented him from having a fair trial.

On said day the District Attorney, acting through his said deputies, for the purpose of inflaming the minds of the jurors, caused to be brought into the court room the said two rattlesnakes. The said snakes were in a box which was carried down the aisle of the court room, every seat of which was occupied. The snakes were alive and sounding their rattles. A wave of terror—I can find no other language more accurate—swept through the court room. Spectators rose from their seats. Some nearest the aisle shrank away. Many uttered exclamations of fright.

The scene as described by a reporter for the Herald-Express was as follows:

“Buzzing their hollow rattles so loudly that women in the crowded courtroom shivered and shuddered at the eerie, frightening sounds, two diamond-back rattlesnakes glittering in their new skins today were placed on the counsel table in Superior Charles W. Fricke's court, where Robert S. James, Birmingham barber, crouched ghost-faced and jittery at his trial for the murder of his golden-haired bride, Mary.”

“Paraded across the courtroom in a velvet covered, venom splashed, 5-foot glass cage, two deadly diamond-back rattlesnakes late today hissed and shook their hollow rattles eerily, and struck out with their evil wedge-shaped heads,

as they were exhibited less than 2 feet away, before the fascinated eyes of 10 men and 2 women who make up the jury trying Robert S. James for the murder of his golden haired wife, Mary."

"The reptiles had just been identified by Snake Joe Hotenbrink as Lethal and Lightning, two guaranteed "hot" snakes he had sold to Charles H. Pope, hard talking ex-sailor, the day before Mrs. James was slain by drowning in her bathtub in her La Canada home."

The Examiner reporter gave the following description of the scene:

"Men's enemy from primordial ages, the snake, yesterday was made the living, visible symbol of the Robert James murder case. Two diamond-backed rattlesnakes hissed and [fol. 2345] struck before the trial jury as a long glass box was borne forward like a hideous offering of a black ritual."

I was standing with my face toward the jury at the time. I noticed some of them gave a kind of gasp almost at the moment I noticed the consternation of the audience. Some of the spectators, however, rose to their feet. Many of them made audible exclamations. Those nearest the aisle, shrank away. I made a protest at the time because of the obvious effect which the bringing of the snakes into the court room had upon the spectators who were there.

I am informed and believe, and therefore state the fact to be, that the bringing of the rattle snakes into the court room in the manner described had such effect upon the minds of the jurors as prevented them from giving fair consideration to the evidence thereafter introduced by the defendant. The source of my said information is a newspaper article containing alleged interviews with members of the jury, none of whom have publicly, or so far as I know at all, denied the statements attributed to them.

The said interviews were published in a daily newspaper of large circulation, to-wit, the Los Angeles Examiner, of July 25, 1936, and I quote from them as follows:

Harold W. Hart, one of said jurors, said:

"James had been convicted in my own mind ever since they brought the rattle snakes into the court room, showed them to us, and then introduced witnesses who told us that [fol. 2346] James had actually stuck his wife's foot into a

box containing one of those serpents and had watched it strike her."

Mrs. Ollie Sype said:

"The sight of the rattlesnakes which were exhibited as the weapons by which Robert James did his wife to death stunned me. It was the most shocking experience of my life."

Harvey M. Gray said:

"I think that jurors should be governed by the preponderance of evidence in the doctrine of reasonable doubt. So far as I am concerned, the preponderance of the evidence was all to the prosecution."

Thereafter, the District Attorney, acting through his said deputies, committed further misconduct which prevented a fair trial of the cause. I am informed and believe that on the 15th day of July, 1936, during a noon intermission, one A. Pierce Artran was present in the court room at the request of the District Attorney. He did not testify in the case and was not sworn as a witness but during the said intermission, according to my said information and belief, he opened the box containing said rattlesnakes and was holding one with a forked stick, demonstrating to those who were present the mouth and fangs of said snake, when it escaped from him and slid under a bookcase in the court room, in which there were a large number of spectators. That the said snake was loose in the court room for a considerable period of time and was not returned to its box [fol. 2347] until nearly time for court to convene. The sources of my said information are the newspaper articles of July 15, 1936, and July 16, 1936, published in the papers above referred to. I also received information from the Clerk, Mr. Arthur More, casually, that one of the snakes had been out of the box, which information was a brief affirmative reply to a hurried question on my part. I was also so informed by my associate, Mr. Russell E. Parsons, who, as I understand, was not present, and received his information from others. And I was also so informed by a Mr. O'Brien, who is employed by Mr. Parsons, and I received similar information from a number of others. I was informed by Mr. O'Brien, and others whose names I do not now recall, that persons whom they thought they

recognized as jurors passed through the court room during the time when the rattle snake was out and before the excitement which it caused had subsided.

The presence of the snakes in the court room proved nothing. They were not brought into the court room for the purpose of proving anything. There is no evidence as to one of them that it was ever in the vicinity of the deceased, Mrs. James; and there was no attempt to identify either one of them as the rattle snake which it was claimed did strike Mrs. James. The snakes were produced for the effect that two live rattle snakes—any two live rattle snakes—would have upon the jury. Any other two rattle snakes would have served the same purpose.

[fol. 2348] The District Attorney committed further misconduct which prevented a fair and impartial trial, and in particular as follows: one of the investigators for the District Attorney is, and at the times herein mentioned was, Scott Littleton; that said Scott Littleton was one of the investigators employed for the purpose of gathering evidence in connection with this case.

There is a magazine of National circulation, published at 1926 Broadway, Lincoln Square, New York, but said magazine has an extensive circulation and is sold at the news stands throughout the city of Los Angeles. That the said Scott Littleton wrote and there was published in the said magazine an article written by said Scott Littleton and purporting to state the real facts in connection with the alleged murder of the defendant's deceased wife. That the said article was so published in a number of said Liberty Magazine dated July 25, 1936, and was exposed for sale and sold at the news stands in the city of Los Angeles on and after said date and while the trial of said cause was in progress. That the said article was written in such manner, as to contain statements calculated further to inflame the public mind against the defendant, such as, "I thought I'd heard about everything in the line of sex that could come over a wire, but this was in a class by itself. The man was tireless, and perverted and sadistic to boot. For two weeks we listened, night after night, usually until [fol. 2349] about two or three in the morning, when he would send his current woman home and go to sleep."

The District Attorney committed further misconduct of such character as to prevent a fair and impartial trial, and in particular as follows:

That one of the investigators for the said District Attorney was one Jack Southard. That during the trial an alleged confession of the defendant was offered in evidence. That affiant objected to the production thereof upon the ground that it was not free and voluntary, and asked leave to introduce evidence to show its involuntary character, and such leave being granted, affiant called Jack Southard to the stand. That said Southard was a hostile witness and was known to affiant to be hostile when affiant placed him upon the stand, but affiant believed that the said Jack Southard would testify truthfully under oath. That affiant asked the said Southard if it were not true that he had struck the said defendant James while the latter was being detained in custody and before any confession had been obtained from him, to which Southard replied in effect that he had struck him in connection with the other case, meaning in connection with a charge of incest upon which this defendant had theretofore been tried.

Upon being examined by Deputy District Attorney Eugene Williams, Southard was asked what James had said immediately before he was struck, and replied in substance [fol. 2350] that he had stated to James that it was too bad that such a nice girl, so well brought up as James' wife, should have met such a death. That James replied in effect that she was not much, she was nothing but —, and then used an opprobrious epithet in connection with her.

That affiant deemed the testimony given by Southard in response to the question of Mr. Williams utterly inconsistent with the statement he had made upon direct examination by affiant; and affiant, in the discharge of his duty to his client, felt called upon to criticise the testimony which embraced such inconsistency. In doing so, affiant moderated his criticism as much as he conceived his duty to his client would permit him to do but that said Southard became incensed, and, although he is a young and vigorous man, much larger and stronger than affiant, he approached affiant and made use of an opprobrious and offensive term stating that if affiant were younger he would use physical force upon him. That the opprobrious term was used by Southard in the immediate presence of the Deputy District Attorney, while the Judge was upon the bench, just after court had adjourned, while spectators were leaving the room, and while jurors must still have been in the corridor just outside. That by reason of the said misconduct on the

part of the District Attorney, acting by and through his said deputies and investigators, the attention of counsel for the defendant was diverted from the essential facts, [fol. 2351] and an atmosphere of terror was thrown around the court room during almost the entire period occupied by the trial, and public sentiment was so strong against the defendant that it is inconceivable that the jury, not having been locked up, expressions of hatred and resentment should have failed to reach them.

And in addition to the acts of misconduct herein set forth, affiant states that the defendant has newly discovered evidence, which could not have been produced by him by the exercise of the utmost diligence prior to the trial. That the said evidence came to the knowledge of the defendant's counsel through a letter received by them from a person at Pike's Peak, whose name was blank and whose address was furnished, and who stated that he saw the former wife of the defendant, who received injuries descending from Pike's Peak, shortly before she left the summit, and that she was sober and not under the influence of liquor, as claimed by witnesses for the prosecution. That such information was not known until the time of the trial; that it was received first by the defendant himself, who handed the letter to affiant. That affiant thereupon called the court's attention to it and that at various times through the trial, time was asked in which to take the deposition of said witness but the same was refused.

Also during said trial, counsel for the defendant learned with regard to a witness named Madge Reed; that the said [fol. 2352] witness had sent an anonymous letter to an insurance company in which the wife of defendant had been insured. That she sent further letters to the District Attorney's office; that in said letters she made statements inconsistent with the testimony given by her at the trial. That in particular she stated in such anonymous letters that the defendant had been too drunk to register at the hotel at the time that she claimed he had told her the circumstances of his wife's death and had offered her \$2000 if she would testify for him in case he should ever be indicted for his wife's murder. I have no clear recollection of all the details of her testimony but *but* I have caused to be set forth below an extract from the said article by Scott Littleton which contains the information

here referred to. That the said article came to affiant's attention during the trial but that by reason of the importance of other duties devolving upon him he did not read it carefully until after Miss Reed had been excused, in fact, according to his present recollection, Miss Reed had been excused before the said magazine was published.

There is an error I wish to correct. The person who let the snake out of the box was used as a witness.

Wm. J. Clark.

Subscribed and sworn to before — this 8th day of August, 1936. Frost E. Stockslager, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[fol. 2353] Endorsed: Received a copy of the within this 8 day of August 1936. Buron Fitts, District Atty, By A. S.

[File endorsement omitted.]

[fol. 2254] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

MINUTE ENTRY—September 8, 1936

Deputy District Attorneys Eugene Williams and John Barnes and defendant with his counsel, R. E. Parsons and W. J. Clark by Ray O'Brien, present.

Due to the absence of counsel for defendant, on motion of defendant, the hearing on the motion for a new trial is continued to September 10, 1936, at 9:00 A. M.

[fol. 2355] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

MINUTE ENTRY OF JUDGMENT—September 10, 1936

Deputy District Attorneys Eugene Williams and John Barnes and defendant with his counsel, W. J. Clark and R. E. Parsons, present.

Motion for new trial comes on for hearing and is denied. No legal cause appearing why judgment should not be

pronounced, the court pronounces judgment and sentence as follows: Defendant is sentenced to the California State Prison at San Quentin to suffer death by hanging, date to be hereafter set. This sentence is entered in Judgment Book No. 32, Pages 250-A and 250-B.

The defendant announces in open Court that he appeals to the District Court of Appeal of the State of California, Second Appellate District, from the Court's order denying Defendant's motion for a new trial, from the judgment [fol. 2356] pronounced herein and the whole thereof.

Defendant is remanded.

[fol. 2357] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

COMMITMENT—Filed September 14, 1936

To the Sheriff of Los Angeles County, and to the Warden of the State Prison of the State of California at San Quentin:

Be it Remembered, that on the 6th day of May, in the year of our Lord, 1936, an Indictment was returned by the Grand Jury of the County of Los Angeles, State of California, against the above named Major Raymond Lisenba, also known as Robert S. James, which Indictment was, on the said 6th day of May, in the year of our Lord, 1936, filed in the Superior Court of the State of California, in and for the County of Los Angeles, charging the said Major Raymond Lisenba with the crime of Murder, a felony;

That thereafter, and on the said 6th day of May, in the year of our Lord, 1936, the said defendant, Major Raymond Lisenba, was duly and regularly arraigned in said Court, being then and there present and accompanied by his counsel, and requested additional time until the 11th day of [fol. 2358] May, in the year of our Lord, 1936, within which to plead; and thereafter, on the 11th day of May, in the year of our Lord, 1936, being then and there present and accompanied by his counsel, the said defendant was again duly arraigned and entered a plea of "Not Guilty" and a plea of "Not Guilty by Reason of Insanity" to said Indictment; that thereafter, on or about the 22nd day of June,

in the year of our Lord, 1936, the defendant, Major Raymond Lisenba, being then and there present and accompanied by his counsel, was placed upon trial in Department 43 of the above entitled Court upon his plea of "Not Guilty;"

A jury was duly selected, accepted and sworn, as provided by law, whereupon and whereafter evidence was adduced on behalf of the People of the State of California and on behalf of the said defendant, Major Raymond Lisenba, and closed. After arguments of counsel and instructions of law by the Court, the jury retired to deliberate upon its verdict; that thereafter, on the 24th day of July, in the year of our Lord, 1936, in the presence of said defendant and his counsel the jury returned its verdict finding the defendant, Major Raymond Lisenba, guilty of murder, and finding it to be murder of the first degree, and determining that as punishment therefor the said Major Raymond Lisenba should suffer the penalty of death; that said verdict was thereupon recorded as provided by law; and thereafter on or about the 28th day of July, in the year of our Lord, 1936, the defendant, Major Raymond [fol. 2359] Lisenba, being in court and accompanied by his counsel, formally withdrew his plea of "Not Guilty by Reason of Insanity" theretofore entered to said Indictment; and thereafter made a Motion for a New Trial and asked for time to file affidavits in support of said Motion. Thereupon at the request of defendant the Court granted him additional time to and including the 8th day of August, in the year of our Lord, 1936, within which to file such affidavits, and granted the People additional time to and including the 18th day of August, 1936, within which to file counter affidavits, and at the request of the defendant, as aforesaid, fixed the 8th day of September, in the year of our Lord, 1936, at the hour of 9:30 o'clock A. M., as the time, and Department 43 of the above entitled Court, as the place for the consideration and determination of said Motion for a New Trial.

That on the 8th day of September, in the year of our Lord, 1936, in Department 43 of the above entitled Court, the defendant being present but not accompanied by his counsel, requested a continuance for the hearing of said Motion for a New Trial and for judgment until the 10th day of September, in the year of our Lord, 1936, at the hour of 9:00 o'clock A. M., because of the absence from the

city of defendant's counsel. That said Motion was thereupon at the request of said defendant granted by the Court and the cause continued until September 10, in the year of [fol. 2360] our Lord, 1936, at the hour of 9:00 o'clock A. M., in Department 43 of said Superior Court.

That thereafter on the 10th day of September, in the year of our Lord, 1936, in Department 43 of the above entitled Court, the defendant being present and accompanied by his counsel, and the People duly represented, said Motion for a New Trial was duly presented, argued and submitted to the Court for its decision, and that said Motion was then and there duly denied by the Court; whereupon the said Major Raymond Lisenba was duly arraigned for judgment and sentence and no legal cause being shown why judgment and sentence should not be pronounced, the Court duly rendered and there was then and there duly pronounced and entered against said defendant, Major Raymond Lisenba, judgment and sentence as follows:

"It is now the judgment and sentence of this Court that for the offense of Murder in the First Degree you suffer the penalty of death, such penalty to be inflicted within the walls of the State Prison of the State of California at San Quentin, at a time to be fixed in the Warrant of Execution, and you are remanded to the custody of the Sheriff of the County of Los Angeles, State of California, to be by him, within ten days from this date, delivered into the custody of the Warden of the State Prison at San Quentin for Execution of sentence."

[fol. 2361] Now, Therefore, This is to Command You, the Sheriff of the County of Los Angeles, State of California, within ten days from this date, to deliver the said Major Raymond Lisenba into the custody of the Warden of the State Prison at San Quentin, California, for the execution of sentence;

And, Furthermore, This is to Command You, the said warden of the said Prison of the State of California, at San Quentin, to hold the said Major Raymond Lisenba within the walls of said State Prison at San Quentin, California, pending the decision upon his appeal in the above entitled case, and until further order of this Court.

In Testimony Whereof, I have hereunto set my hand as judge of the said Superior Court, and caused the seal of

said Court to be hereto affixed, this 10th day of September, in the year of our Lord, 1936.

Chas. W. Fricke, Judge of the Superior Court.

Attest: L. E. Lampton, County Clerk, by A. W. Moore, Deputy. (Seal.)

[fol. 2362] [File endorsement omitted.]

[fol. 2363] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

STATEMENT OF GROUNDS OF APPEAL AND DEMAND FOR PHONO-
GRAPHIC TRANSCRIPT—Filed September 11, 1936

To the Honorable, the Superior Court of the State of California, in and for the County of Los Angeles, Honorable Charles W. Fricke, Judge Presiding:

The defendant, Major Raymond Lisenba, having appealed from the order denying defendant's motion for new trial, and the judgment of this Court entered in the above entitled matters, said judgment having been made and entered by said Court under date of September 10th, 1936, now makes application, through his counsel, William J. Clark, Esq., and R. E. Parsons, Esq., for an order under the provisions of the rules of the Judicial Council of the State of California, and of the law in such case made and provided, for the transcription of phonographic notes to be used in the presentation of said cause upon appeal and states also in general terms as required thereby, the grounds and points upon which said defendant relies upon said appeal.

[fol. 2364] Said grounds and points are as follows, to wit:

1st. Insufficiency of the Evidence to justify or sustain the verdict rendered herein.

2nd. That the Court misdirected the jury in matters of law.

3rd. That the Court erred in its decision of questions of law arising during the course of the trial, and in each and every one of said decisions arising out of objections made by the defendant to the introduction of testimony and evi-

dence offered by the prosecution where such objections were overruled.

4th. That the Court erred in its decisions of questions of law arising during the course of the trial and in each and every one of said decisions arising out of objections made by the plaintiff to the introduction of testimony and evidence by the defendant where such objections were sustained.

5th. That the verdict is contrary to law.

6th. That the Court erred in its decisions of questions of law arising during the course of the trial in its decisions on each and every objection interposed by the defendant and overruled and on each and every objection interposed by the plaintiff and sustained.

7th. That the verdict is contrary to the evidence.

8th. That the Court erred in giving each and every instruction given for the plaintiff in said cause.

[fol. 2365] 9th. That the Court erred in refusing each and every instruction offered by the defendant and refused by the Court.

10th. That the Court erred in modifying all the instructions submitted and proposed by the defendant which were modified by this Court and thereafter given to the jury.

11th. That the Court erred in denying the defendant's motion for a new trial filed herein and erred in not granting said Motion on each and every ground in said motion set forth.

12th. That the Court erred in each and every decision upon questions of law where such decision was adverse to the defendants, from the time of filing the original indictment herein up to and including the time of pronouncement of sentence herein.

13th. Misconduct of the District Attorney during the course of the trial.

14th. Misconduct of the Trial Court during the course of the trial.

15th. That the Court erred in reading to the jury, during the course of the deliberations of the jury, certain testimony which had been given during the course of the trial.

The defendant designates the whole of the phonographic notes including the argument of the District Attorney and [fol. 2366] the proceedings had at the time the jury returned into court and submitted certain questions to the Court for answer, and during which time certain testimony was read by the Court to the jury as being necessary to be transcribed so as to fairly present the points relied upon.

Wherefore, the defendant, Major Raymond Lisenba, prays this Honorable Court for its order to direct the phonographic reporter to transcribe the whole of his notes taken in any and all of the steps taken or proceedings had in the above entitled action from its inception to the finish thereof in the Superior Court whether the said steps or proceedings were herein specifically mentioned or not.

Dated this 11th day of September, 1936.

R. E. Parsons and William J. Clark, by R. E. Parsons,
Attorneys for Defendant.

Let the transcript be prepared as prayed for above.

Dated September 11, 1936.

Chas. W. Fricke, Judge of the Superior Court.

[fol. 2367] [File endorsement omitted.]

[fol. 2368] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

CERTIFICATE OF PROBABLE CAUSE—Filed September 11, 1936

The Court having heretofore pronounced judgment of conviction of murder in the first degree upon said defendant, by which judgment it is substantially provided that he be taken to the State Prison at San Quentin and there, at a date to be fixed hereafter, hanged by the neck until dead,

And the said defendant having duly given notice of appeal from said judgment of conviction,

And it appearing to the court that there is probable cause for said appeal, and that the same presents questions of law proper for the consideration of the Supreme Court,

It Is Hereby Ordered that execution of said judgment and of each and every part thereof, be stayed pending the determination of said appeal and that the said defendant

be retained in custody at the County Jail of said Los Angeles County by the Sheriff thereof until the further order of this Court.

Chas. W. Fricke, Judge of the said Superior Court.

[fol. 2369] [File endorsement omitted.]

[fols. 2370-2371] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 2372-2379] Service of the within and receipt of a copy hereby admitted this 30th day of September, 1936.

Buron Fitts, District Attorney, by F. R. Cummings,
Chief Clerk, Counsel for Plaintiff and Respondent.

Due service of the within and receipt of a copy hereby admitted this 30th day of September, 1936.

R. E. Parsons, of Counsel for Defendant and Appellant.

Due service of the within and receipt of a copy hereby admitted this 30 day of September, 1936.

U. S. Webb, Attorney General, by Frank Richards,
Deputy.

[fols. 2380-2384] IN SUPREME COURT OF CALIFORNIA

In Bank

Crim. No. 4068

PEOPLE

VS.

LISENBA (JAMES)

ORDER VACATING JUDGMENT—Filed April 20, 1939

Upon petition for rehearing, the judgment of the court, heretofore entered herein, is hereby vacated and set aside.

Dated: April 20, 1939.

Seawell, Acting Chief Justice, Curtis, Justice, Langdon, Justice, Houser, Justice.

[File endorsement omitted.]

[fol. 2385] [File endorsement omitted.]

[fol. 2386] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PETITION FOR REHEARING—Filed October 25, 1939

To the Honorable Justices of the Supreme Court of the State of California:

Your Appellant most respectfully petitions for rehearing of the decision rendered upon rehearing of the cause, and for a reconsideration of the entire cause, and for a reference back for the taking of further evidence in the light of new developments since the cause was heretofore submitted on new and different grounds than those heretofore submitted, namely:

That the Trial of the Cause and the Proceedings Had were in Violation of the Fourteenth Amendment to the Constitution of the United States and the Due Process Clause of Article I, Section 13 of the Constitution of California.

We respectfully show in respect thereto:

I

That the Bringing of Live, Hissing Rattlesnakes into a [fol. 2387] Courtroom and Exhibiting Them to a Jury was so Inflammatory and Frightening in its Nature as to make of the Trial a Mock and Sham and Violate the Fundamental Guarantee of Due Process of Law Guaranteed by the Fourteenth Amendment to the Constitution of the United States (as well as the same Provisions Contained in Article I, Section 13 of the Constitution of California.

II

That Third Degree Brutal Methods were Used upon the Defendant Lisenba (Robert S. James) to Coerce and Extort a Purported Confession, and that the Use in Evidence of such Alleged Confession Obtained by such Means and Methods Make Void the Entire Trial under the Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States.

III

That Prolonged Questioning Without Sleep and under Tortuous Mental Ordeal, Similar to that Employed in the Dark Ages, and in the Torture Chamber, were Used upon the Defendant, and Statements thus Extorted and coerced were permitted in Evidence in the Trial. That the use of the Alleged Confession in Evidence Obtained by These Methods was in Violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

IV

That the Principal Evidence Against the Defendant was that of an Alleged Accomplice named Charles H. Hope. That since the Trial the said Charles H. Hope has made [fol. 2388] Affidavits and Filed the same in the Superior Court of Los Angeles County, Stating that his testimony was obtained by Deceit, Fraud, Collusion and Coercion and was Entirely False; that He was Impelled by Force and Fear, Threats and Promises and that all these Facts, Including the Falsity of his Statements, were known to the Prosecution and Participated in by them. That Testimony thus Obtained and the Conviction Based thereon Make a Trial a Mere Pretense and are all in Violation of the Due Process of Law, Guaranteed by the Fourteenth Amendment of the Constitution of the United States.

V

That Alleged Evidence of Another Purported Offense in Another State was Presented in the Trial of this Case, Without any Indictment, Information or Judgment thereon and without any Jurisdiction of the California Court of the Subject Matter therein, and that said use of said Testimony Placed the Defendant upon Trial in California before a California Jury on such Purported Offense, and is in Violation of Due Process of Law, Guaranteed by the Fourteenth Amendment to the Constitution of the United States.

VI

That Major Raymond Lisenba was Unlawfully Imprisoned, and Isolated in a Private Building for Three Nights and Days, before being Lodged in any Jail: That he was then Held Practically Incommunicado for Eleven Days,

and almost Incessantly Questioned by Officers until the [fol. 2389] Alleged Confession was Given, and that the use thereof in Evidence in the Trial was in Violation of Due Process of the Law Guaranteed by the Fourteenth Amendment to the Constitution of the United States.

VII

That the Repeated Taking of Defendant Lisenba from Jail without his Attorney and Against his Consent and to the Office of the District Attorney and Other Places and after Prolonged Questioning without Food and without rest and thereafter Extorting a Purported Confession which was used in the Case against Appellant was in Violation of Due Process of Law Guaranteed by the Fourteenth Amendment to the Constitution of the United States.

[fol. 2390]

I

That the Bringing of Live, Hissing Rattlesnakes into a Courtroom and Exhibiting them to a Jury was so Inflammatory and Frightening in its Nature as to make of the Trial a Mock and Sham and Violate the Fundamental Guarantee of Due Process of Law Guaranteed by the Fourteenth Amendment to the Constitution of the United States (as well as the same Provision Contained in Article I, Section 13 of the Constitution of California.

The Fourteenth Amendment to the Constitution of the United States provides as follows:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.”

“Due process of law refers to the law of the land “exercised within the limits of those *fundamental* principles of liberty and justice which lie at the base of all our civil and political institutions.” *Hurtado v. California*, 110 U. S. 535; 28 L. Ed. 232.

[fol. 2391] Mr. Webster, in *Dartmouth College v. Woodward*, 4 Wheat. 518; 4 L. Ed. 629, defined due process of law as the law of the land—"A law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

The meaning of rendering judgment only after trial must be read to mean "fair trial."

For it is said in *ex parte Nelson*, 251 Mo. 63, that "these constitutional provisions are but different modes of expressing the fundamental right of man to a fair and impartial trial, be he innocent or be he guilty."

And in *Moore v. Dempsey*, 261 U. S. 86; 67 L. Ed. 543, the United States Supreme Court said that a trial for murder in a State Court which was hurried to conviction by mob domination was without due process of law and absolutely void.

Can it be said that a trial is fair and in accordance with Due Process of Law, guaranteed by the Fourteenth Amendment to the Constitution of the United States, when live, hissing rattlesnakes are brought into the courtroom and exhibited to the jury?

This Court must take judicial notice of the effect of rattlesnakes, of the fear and fright they create in any human being. Courts take judicial notice of matters of common knowledge (16 C. J. 512) and of the effect of physiological facts (16 C. J. 514) and certainly the frightening effect of a rattlesnake is well known to everyone.

[fol. 2392] Assume that this were a civil case involving damages growing out of a snake bite. Would this or any court permit the bringing in of rattlesnakes to exhibit to the jury? And if a high verdict was rendered would this court not reject it as being the result of passion and prejudice engendered by the unfair bringing in of rattlesnakes into the courtroom—such unfairness as to vitiate the verdict because it was not compatible with those fundamental concepts of due process of law guaranteed by the law of the land, the Fourteenth Amendment to the Constitution of the United States.

And where the jury is frightened into a verdict by rattlesnakes in the Courtroom and under such passion and prejudice brings in its supreme verdict, the taking of the life of a fellow human being, can it be said that such a trial under such circumstances is not a violation of due process

of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

We respectfully submit that it was unnecessary to bring these live, venomous vipers into the courtroom, that their use was only for the purpose of inflaming the jury, and bringing about a verdict from passion and prejudice. That such a verdict is one similar to mob rule and not one that results from law exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions; it is not such law as accords a fair and impartial trial to man in accordance with fundamental rights. It is not due process, guaranteed [fol. 2393] by our Fourteenth Amendment to our Federal Constitution. A jury frightened or inflamed into a verdict by two rattlesnakes is no different than a jury frightened or inflamed into a verdict by a mob. The entire proceedings became coram non judice because of reptile domination. They became void under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Just what happened in the courtroom when the rattlesnakes were brought in is best shown by two affidavits filed by Attorneys R. E. Parsons and William J. Clark (Cl. Tr. 160-182) on motion for new trial. The pertinent portions of the affidavits relating to the bringing in of snakes in the courtroom are as follows:

“IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN
AND FOR THE COUNTY OF LOS ANGELES

No. 64218

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

MAJOR RAYMOND LISENBA, Defendant.

AFFIDAVIT

STATE OF CALIFORNIA,

County of Los Angeles, ss.

R. E. PARSONS, being first duly sworn, and upon his oath, deposes and says: That he is one of the attorneys in the above entitled matter and that as such he was present

[fol. 2394] during the course of the trial of the above named defendant in Department 43 of the above entitled court and that upon one occasion during the course of the trial, and while testimony was being taken, affiant heard a commotion in the rear of the courtroom and upon looking up saw one of the investigators of the District Attorney's office of this County, and who had been working in and upon the preparation of this case and who, from time to time had been sitting at the counsel table during the trial of this case, entering the court room with another gentleman and the two of them were carrying a box which box was approximately a foot square and about five feet long and one side was made of glass so that upon looking into the glass one could see the entire inside of the box, and there within the box, were two live rattlesnakes commonly known as "diamond back", and affiant could hear the rattle of these snakes, notwithstanding the proceedings within the court room were then actually being carried on as these men entered the court room with the box containing the two live rattlesnakes.

That there was considerable commotion within the courtroom and affiant as he turned about the courtroom, saw numerous people partially arising from their seats and looking in the direction of the two men who were carrying the box of live rattlesnakes within the courtroom; that affiant could hear numerous comments made by persons within the court room which remarks were, however, made in an [fol. 2395] undertone and affiant could not tell exactly what the spectators within the courtroom said, but affiant noticed the jury, immediately upon the entering of the courtroom by the District Attorney's investigator and the other man, who were carrying the box of live rattlesnakes directed their attention from the actual proceedings then taking place within the courtroom, and the eyes of the jurors were immediately centered upon the two men who were entering the courtroom with the box of rattlesnakes; that the box of rattlesnakes was taken to a position in the courtroom immediately behind the clerk's desk and the box was set down and at a later time this same box of rattlesnakes together with the two rattlesnakes therein contained, was offered in evidence by the People over an objection of the defendant, and thereupon said box of rattlesnakes, with the glass portion thereof turned toward the jury, was placed

upon the counsel table at a position approximately four or five feet from the front of the jury box, and affiant noticed that the attention of the jury was thereupon attracted to and centered upon the said live rattlesnakes which were then contained in said box and which were exhibited to the jury as aforesaid.

That during the course of the trial a letter was received eventually by affiant, as one of counsel for the defendant, from a man by the name of — which letter was offered in [fol. 2396] evidence by defendant in support of a motion by the defendant for a continuance, this letter indicating that this man had seen the defendant and his wife, Winona, at Pike's Peak upon the day and immediately before the automobile accident upon Pike's Peak in which Winona James, a former wife of the defendant, suffered severe injuries and which evidence of the accident was offered by the District Attorney in support of their contention that Winona James, a former wife of the defendant was murdered by the defendant, and the letter from Mr. — was to the effect that he had seen Winona James and her husband immediately prior to the happening of the accident and that they were at that time not under the influence of intoxicating liquor.

That affiant, while in the course of the trial, came into possession of a copy of "Liberty Magazine" of the date of July 25, 1936 which magazine was for sale upon the news stands of the City of Los Angeles and was offered for sale during the course of this trial at the very entrance of the Hall of Justice within which building the courtroom within which this trial was occurring, was actually situated, and it would have been necessary, and was necessary, for members of the jury as they passed to and from the building, to pass by news venders who were actually selling said issue of Liberty Magazine there and upon the cover of said magazine was the following: "The strangest Crime Los Angeles Ever Knew—Detective Littleton tells the inside story of the Snake Man's Wife Murder."

[fol. 2397] That commencing on page 16 of the said issue of said issue of Liberty Magazine was an article headed "Death at the Lily Pond" "The Strangest Crime Los Angeles Ever Knew. Reading time 35 minutes 15 seconds. The lily pond. Beside it Mary Busch James was found lying dead." And upon page 16 of the said Liberty Magazine the following is found set up in the center of the page

in large type: "The astonishing inside story of the Snake Man's Wife Murder—by One of the Detectives who 'Broke' the case—Scott Littleton Staff Investigator for the District Attorney of Los Angeles County". That the said Scott Littleton referred to was one and the same person as Scott Littleton, one of the investigators of this case who actually worked upon the preparation of this case and for the greater portion of the trial sat at the counsel table beside the District Attorney's Deputies prosecuting the defendant.

That among other things the said article recited the following: (page 20 of said Liberty Magazine) "Meanwhile we went around and around with him about the death of his wife. For nearly sixty hours we kept him awake, taking turns questioning him", this referring to the questioning of the defendant immediately after his arrest and the testimony elicited from the officers upon the stand indicated that the defendant had been arrested on Sunday the 19th at about 9 or 10 A. M. and had actually been booked in the County Jail on Tuesday the 21st at about 9 to 10 A.M. being approximately 48 hours, and there was some testimony by an investigator that James slept in a chair starting at about 3 o'clock Tuesday morning, the 21st.

It would appear from the article in Liberty Magazine that James was actually "kept awake", his inquisitors taking turns questioning him for nearly 60 hours, this statement being by an investigator of the District Attorney's Office of Los Angeles County who had actually worked upon the case and this statement in Liberty Magazine to the effect that the defendant James was kept awake for 60 hours was at variance with all of the testimony given by the investigators to the effect that he had been kept awake for only 48 hours, and that then he had been permitted to sleep some.

That during the course of the trial the defendant Hope denied that he had ever discussed his proposed testimony with any person, and the article in Liberty Magazine recites as follows (page 20): "I have arrested quite a few people for major felonies. Hope, I could tell, was just made to order for us. 'James certainly puts you in the middle', I said. 'He's spilled the works to us, but I'm damned if you look like that kind of a guy.' Would he take the bait? I held my breath. 'I had nothing to do with it,' he said,

with strong emphasis on the 'I'. We had our man!" "You mean he did the whole thing?" I asked in a tone of disbelief. 'Don't give me that—you were in it right up to your neck with him'. 'I wasn't, I tell you. He did it all.' "Snakes—and everything?" Southard ventured (Southard [fol. 2399] was the man actually in charge of the investigation for the District Attorney). 'He told me he wanted them to fight. He told me he was going to have snake-fights and invite his friends'. 'So James is telling us the truth when he says you got them for him?' 'Yes,' he said, 'I got them for him but I didn't know what he was going to use them for. He had me hypnotized, I tell you!'

"'He had you cut in on the insurance,' Southard said, 'Don't try to kid us. We've got the whole story.' 'I'm not. So help me God, all I did was help carry her out after she was dead. He made me do it, so help me!' 'You didn't have a thing to do with drowning her?' 'Not a thing! He did th t, I swear to you he did!'

"A confession? Of course it was. A partial one, anyhow. The thing was to get him back to town, go to work on him, and get it all down in black and white before the newspaper storm broke. On the way we tried to get over to him the idea that the more he talked the better his chances would be of escaping the rope. By the time we reached the Hall of Justice he said he was all set to shoot the works with us.

"We bought him a meal, then joined District Attorney Fitts, Deputy District Attorney Williams, and Chief Plummer. Assistant Chief Griffen (Deputy Chief Griffen was one of the investigators who had James in custody and questioned him for many hours immediately after his ar-[fol. 2400] rest) and a stenographer were there and we got right down to business. At three o'clock the following morning we had dug out of Chuck Hope, ex-sailor and floor finisher, a story that Poe might have imagined."

Later on in said article, on page 21, among other things this is written by Littleton, the author of the article: "Did you believe that?" asked Captain Plummer (referring to a conversation with Hope). 'Of course not' said Hope. 'I thought he was kidding, but I was broke and almost any kind of a proposition looked good to me.'

That none of counsel for defendant had the slightest inkling that such an article had ever been written and

submitted to any magazine or they would have prepared to take depositions so that the original manuscript of the article might have been presented to the Court, and affiant first learned of the existence of such an article when he saw the July 25th, 1936 copy of Liberty Magazine. That as has been indicated, there are numerous matters set forth in said story in Liberty Magazine of such a nature as to constitute important evidence to the cause of defendant and said matters as related in said article written by Scott Littleton, District Attorney's investigator, are directly opposite to sworn evidence given upon the trial of this case and it would have been, and was, and is important to the cause of the defendant that the evidence as set forth in said article submitted to the editors of Liberty Magazine [fol. 2401] zine, could have been presented to the Court.

That affiant talked with a great many persons during the course of the trial who reminded affiant of the existence of this story in Liberty Magazine and that they had read the same, and it would appear that Liberty Magazine did at the time of the sale of this particular issue, have a tremendous sale within the City of Los Angeles, of many thousands of copies, and that Liberty Magazine is one of the leading national weekly magazines, widely read, and that said article so published in said magazine during the course of this trial could only have had an effect upon members of the jury prejudicial to the cause of the defendant.

R. E. Parsons.

Subscribed and sworn to before me this 8th day of August, 1936. H. Y. Gibson, Notary Public in and for the County of Los Angeles, State of California.
(Seal.)

[fol. 2402] [Endorsed:] No. 64218. In the Superior Court of the State of California, in and for the County of Los Angeles. People of the State of California, Plaintiff, vs. Major Raymond Lisenba, Defendant. Affidavit in Support of Motion for New Trial. Received Copy of the within Affidavit this 8th day of August, 1936. Buron Fitts, D. A., by A. Schweitzer, Attorney for Plaintiff. Filed 1936, Aug. 8 A. M. 11:49. L. E. Lampton, County Clerk, by Harry Lieb, Deputy.

[fol. 2403] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

No. 64218

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

MAJOR LISENBA, also known as ROBERT S. JAMES, Defendant

Affidavit of Wm. J. Clark

STATE OF CALIFORNIA,

County of Los Angeles, ss:

WM. J. CLARK, being first duly sworn, deposes and says: I am one of the attorneys for the defendant and was one of the attorneys that represented him at the trial of the above entitled cause. There was a strong public sentiment against him before the trial commenced. It was so strong that serious consideration was given to the question as to whether a motion should be made for a change of venue. When a jury was selected I suggested to Hon. Chas. W. Fricke that the jury be locked up during the trial but it was not so ordered and the jurors were not removed from contact with the public nor prevented from reading the papers except that they were admonished not to do so.

All the daily papers, of which there were four, namely, the News, the Times, the Herald and the Examiner, carried daily stories unfavorable to the defendant and each day the court room was filled with an unfriendly audience, while [fol. 2404] from twenty to sixty persons were waiting in the corridors almost throughout the trial.

There was the testimony of one Charles Hope that he had procured rattlesnakes at the solicitation of the defendant and the latter had thrust his wife's foot into a box containing one of them. As the testimony of said witness appears at length in the reporter's transcript it is not deemed necessary to quote from it here. He did say, however, that the snakes were returned to the men from whom he bought them.

On the 29th day of June the District Attorney, acting through his deputies Eugene Williams and John Barnes, committed such misconduct as inflamed the passions of the jurors against this defendant and prevented him from having a fair trial.

On said day the District Attorney, acting through his said deputies, for the purpose of inflaming the minds of the jurors, caused to be brought into the court room the said two rattlesnakes. The said snakes were in a box which was carried down the aisle of the court room, every seat of which was occupied. The snakes were alive and sounding their rattles. A wave of terror—I can find no other language more accurate—swept through the court room. Spectators rose from their seats. Some nearest the aisle shrank away. Many uttered exclamations of fright.

The scene as described by a reporter of the Herald-[fol. 2405] Express was as follows:

“Buzzing their hollow rattles so loudly that women in the crowded courtroom shivered and shuddered at the eerie, frightening sounds, two diamond-back rattlesnakes glittering in their new skins today were placed on the counsel table in Superior Charles W. Fricke’s court, where Robert S. James, Birmingham barber, crouched ghost-faced and jittery at his trial for the murder of his golden-haired bride, Mary.”

“Paraded across the courtroom in a velvet covered, venom splashed, 5-foot glass cage, two deadly diamond-back rattlesnakes late today hissed and shook their hollow rattles eerily, and struck out with their evil wedge-shaped heads, as they were exhibited less than 2 feet away, before the fascinated eyes of 10 men and 2 women who made up the jury trying Robert S. James for the murder of his golden haired wife, Mary.”

“The reptiles had just been identified by Snake Joe Hotenbrink as Lethal and Lightning, two guaranteed “hot” snakes he had sold to Charles H. Hope, hard talking ex-sailor, the day before Mrs. James was slain by drowning in her bathtub in her La Canada home.”

The Examiner reporter gave the following description of the scene:

“Men’s enemy from primordial ages, the snake, yesterday was made the living, visible symbol of the Robert James murder case. The diamond-backed rattlesnakes hissed and [fol. 2406] struck before the trial jury as a long glass box was borne forward like a hideous offering of a black ritual.”

I was standing with my face toward the jury at the time. I noticed some of them gave a kind of gasp almost at the

moment I noticed the consternation of the audience. Some of the spectators, however, rose to their feet. Many of them made audible exclamations. Those nearest the aisle, shrank away. I made a protest at the time because of the obvious effect which the bringing of the snakes into the court room had upon the spectators who were there.

I am informed and believe, and therefore state the fact to be, that the bringing of the rattlesnakes into the court room in the manner described had such effect upon the minds of the jurors as prevented them from giving fair consideration to the evidence thereafter introduced by the defendant. The source of my said information is a newspaper article containing alleged interviews with members of the jury, none of whom have publicly, or so far as I know at all, denied the statements attributed to them.

The said interviews were published in a daily newspaper of large circulation, to-wit: the Los Angeles Examiner, of July 25, 1936, and I quote from them as follows:

Harold W. Hart, one of said jurors, said:

"James had been convicted in my own mind ever since they brought the rattle snakes into the court room, showed them to us, and then introduced witnesses who told us that [fol. 2407] James had actually stuck his wife's foot into a box containing one of those serpents and had watched it strike her."

Mrs. Ollie Sype said:

"The sight of the rattlesnakes which were exhibited as the weapons by which Robert James did his wife to death stunned me. It was the most shocking experience of my life."

Harvey M. Gray said:

"I think that jurors should be governed by the preponderance of evidence in the doctrine of reasonable doubt. So far as I am concerned, the preponderance of the evidence was all to the prosecution."

Thereafter, the District Attorney, acting through his said deputies, committed further misconduct which prevented a fair trial of the cause. I am informed and believe that on the 15th day of July, 1936, during a noon intermission, one A. Pierce Artran was present in the court room at the

request of the District Attorney. He did not testify in the case and was not sworn as a witness but during the said intermission, according to my said information and belief, he opened the box containing said rattlesnakes and was holding one with a forked stick, demonstrating to those who were present the mouth and fangs of said snake, when it escaped from him and slid under a bookcase in the court room, in which there were a large number of spectators. That the said snake was loose in the court room for a considerable period of time and was not returned to its box until [fol. 2408] nearly time for court to convene. The sources of my said information are the newspaper articles of July 15, 1936, and July 16, 1936, published in the papers above referred to. I also received information from the Clerk, Mr. Arthur More, casually, that one of the snakes had been out of the box, which information was a brief affirmative reply to a hurried question on my part. I was also so informed by my associate, Mr. Russell E. Parsons, who, as I understand, was not present, and received his information from others. And I was also so informed by a Mr. O'Brien, who is employed by Mr. Parsons, and I received similar information from a number of others. I was informed by Mr. O'Brien, and others whose names I do not now recall, that persons whom they thought they recognized as jurors passed through the court room during the time when the rattle snake was out and before the excitement which it caused had subsided.

The presence of the snakes in the court room proved nothing. They were not brought into the court room for the purpose of proving anything. There is no evidence as to one of them that it was ever in the vicinity of the deceased, Mrs. James; and there was no attempt to identify either one of them as the rattle snake which it was claimed did strike Mrs. James. The snakes were produced for the effect that two live rattle snakes—any two live rattle snakes—would have upon the jury. Any other two rattle snakes would have served the same purpose.

[fol. 2409] The District Attorney committed further misconduct which prevented a fair and impartial trial, and in particular as follows: one of the investigators for the District Attorney is, and at the times herein mentioned was, Scott Littleton; that said Scott Littleton was one of the investigators employed for the purpose of gathering evidence in connection with this case.

There is a magazine of national circulation, published at 1926 Broadway, Lincoln Square, New York, but said magazine has an extensive circulation and is sold at the news stands throughout the city of Los Angeles. That the said Scott Littleton wrote and there was published in the said magazine an article written by said Scott Littleton and purporting to state the real facts in connection with the alleged murder of the defendant's deceased wife. That the said article was so published in a number of said Liberty Magazine dated July 25, 1936, and was exposed for sale and sold at the news stands in the city of Los Angeles on and after said date and while the trial of said cause was in progress. That the said article was written in such manner as to contain statements calculated further to inflame the public mind against the defendant, such as, "I thought I'd heard about everything in the line of sex that could come over a wire, but this was in a class by itself. The man was tireless, and perverted and sadistic to boot. For two weeks we listened, night after night, usually until about two or three in the [fol. 2410] morning, when he would send his current woman home and go to sleep."

The District Attorney committed further misconduct of such character as to prevent a fair and impartial trial, and in particular as follows:

That one of the investigators for the said District Attorney was one Jack Southard. That during the trial an alleged confession of the defendant was offered in evidence. That affiant objected to the production thereof upon the ground that it was not free and voluntary, and asked leave to introduce evidence to show its involuntary character, and such leave being granted, affiant called Jack Southard to the stand. That said Southard was a hostile witness and was known to affiant to be hostile when affiant placed him upon the stand, but affiant believed that the said Jack Southard would testify truthfully under oath. That affiant asked the said Southard if it were not true that he had struck the said defendant James while the latter was being detained in custody and before any confession had been obtained from him, to which Southard replied in effect that he had struck him in connection with the other case, meaning in connection with a charge of incest upon which this defendant had theretofore been tried.

Upon being examined by Deputy District Attorney Eugene Williams, Southard was asked what James had said

immediately before he was struck, and replied in substance [fol. 2411] that he had stated to James that it was too bad that such a nice girl, so well brought up as James' wife, should have met such a death. That James replied in effect that she was not much, she was nothing but ————, and then used an *approbrious* epithet in connection with her.

That affiant deemed the testimony given by Southard in response to the question of Mr. Williams utterly inconsistent with the statement he had made upon direct examination by affiant; and affiant, in the discharge of his duty to his client, felt called upon to criticise the testimony which embraced such inconsistency. In doing so, affiant moderated his criticism as much as he conceived his duty to his client would permit him to do but that said Southard became incensed, and, although he is a young and vigorous man, much larger and stronger than affiant, he approached affiant and made use of an *approbrious* and offensive term stating that if affiant were younger he would use physical force upon him. That the *approbrious* term was used by Southard in the immediate presence of the Deputy District Attorney, while the Judge was upon the bench, just after court had adjourned, while spectators were leaving the room, and while jurors must still have been in the corridor just outside. That by reason of the said misconduct on the part of the District Attorney, acting by and through his said deputies and investigators, the attention of counsel for the defendant was diverted from the essential facts, and an [fol. 2412] atmosphere of terror was thrown around the court room during almost the entire period occupied by the trial, and public sentiment was so strong against the defendant that it is inconceivable that the jury, not having been locked up, expressions of hatred and resentment should have failed to reach them."

[fol. 2413] An affidavit in opposition was filed by Deputy District Attorney Eugene Williams. His affidavit admits the bringing into the courtroom of the snakes, but denies the effect of them. Judicial knowledge compels the necessary conclusion that the effect of snakes was as described in the affidavits above quoted.

Since this trial, R. E. Parsons has been made a deputy District Attorney in the office of the Los Angeles District Attorney. Mr. Clark was for many years a Deputy District Attorney.

We respectfully submit, therefore, that the admitted

bringing in of snakes into the courtroom and exhibiting them to the jury violated Due Process of Law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and in the light of this fundamental law, we respectfully submit, requires the granting of a rehearing and consideration of the case in the light of this law of the land, which hears fairly before it condemns, and which renders judgment only after fair trial by a jury unbitten by the fright occasioned by rattlesnake venom.

II

That Third Degree Brutal Methods Were Used Upon the Defendant Lisenba (Robert S. James) to Coerce and Ex' t a Purported Confession, and That the Use in Evidence of Such Alleged Confession Obtained by Such Means and Methods Make Void the Entire Trial Under the Due [fol. 2414] Process Clause of the Fourteenth Amendment to the Constitution of the United States.

In *Brown v. Miss.*, 297 U. S. 278, Mr. Chief Justice Hughes, in reversing the case of a man convicted of murder upon confessions shown to have been extorted by officers of the State by brutality and violence, held that such convictions based upon such confessions are void under the due process clause of the Fourteenth Amendment. The Chief Justice said: (P. 285)

"* * * But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. *Moore v. Dempsey*, 261 U. S. 86, 91. The State may not deny to the accused the aid of counsel. *Powell v. Alabama*, 287 U. S. 45. Nor may a State, through the action of its officers, contrive a conviction through the pretense of a trial which in truth is "but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured." *Mooney v. Hol-*

han, 294 U. S. 103, 112. And the trial equally is mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause required "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert v. Louisiana*, 272 U. S. 312, 316. It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

2. It is in this view that the further contention of the State must be considered. That contention rests upon the failure of counsel for the accused, who had objected to the admissibility of the confessions, to move for their exclusion after they had been introduced and the fact of coercion had been proved. It is a contention which proceeds upon a misconception of the nature of petitioners' complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. *Moore v. Dempsey*, *supra*. We are not concerned with a mere question of state practice, or whether counsel assigned to [fol. 2416] petitioners were competent or mistakenly assumed that their first objections were sufficient. In an earlier case the Supreme Court of the State had recognized the duty of the court to supply corrective process where due process of law had been denied. In *Fisher v. State*, 145 Miss. 116, 134; 110 So. 361, 365, the court said: "Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief inequity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The constitution recognized the evils that lay behind these practices and prohibited them in this country. * * * The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective."

In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, [fol. 2417] and the proceeding thus vitiated could be challenged in any appropriate manner. *Mooney v. Holohan*, *supra*."

The methods used in extorting and coercing an alleged confession from the defendant are told by James himself. (Rep. Tr. 1130-1153)

"Direct examination.

"By Mr. Clark:

Q. Mr. James, you were taken into custody, I believe, by investigators of the District Attorney's office on the 19th of April of this year. That is correct, isn't it?

A. Yes.

Q. And did you have any hernia or rupture at that time?

A. I did not.

Q. Have you now?

A. Yes.

Q. When did you become ruptured?

A. The night of the 21st of April, I believe.

Q. Where were you when you became ruptured?

A. I was on La Salle Avenue next door to the home where I lived.

Q. How did you become ruptured?

A. A long terrific beating that I was taking from Jack Southard and Charlie Griffen.

Q. Had anything been said to you by them or either of [fol. 2418] them before the beating commenced?

A. Yes.

Q. About what time did they commence beating you?

A. Well, they started Monday night, I think, about 10 o'clock.

Q. And about what time did they take you into custody?

A. Sunday morning about 9 o'clock.

Q. Now, state whether or not, after taking you into custody, they interrogated you or questioned you in regard to your wife's death?

A. That was the first thing they asked me.

Q. Who first spoke about it to you?

A. Williams did.

Q. You mean Mr. Eugene Williams, the Deputy District Attorney?

A. Yes, sir.

Q. Where were you when he spoke about it?

A. I was in my own home on La Salle Street.

Q. And who else was present at that time?

A. Well, I think every officer that I ever saw around there was there.

Q. You don't know who they were?

A. There looked like there were 13 or 14 of them.

Q. Well, how long was it after you were taken into custody until you were taken over to the other house?

A. I think about an hour.

Q. And did anyone say anything to you there about your [fol. 2419] wife's death.

A. That is about all they did say anything about.

Q. Well, do you remember when they—do you remember any time when you were shown any dictaphones?

A. Yes, sir.

Q. Do you remember anything that was said about your wife's death at that time?

A. Yes, sir.

Q. Who was the speaker?

A. Southard and Charlie Griffen.

Q. What was the statement at that time?

A. They told me that I might as well confess to my wife's murder, that they had the case on me and that they overheard my conversations in regard to my wife's death.

Q. As near as you can remember is that all that they said then?

A. Well, they said so many things that I cannot remember all that they said.

Q. By the way, at the time they made the arrest, was Mr. Silverman present?

A. No.

Q. Was any person representing you present?

A. No.

Q. After taking you to the house, where this first conversation occurred, where did they next take you?

A. They took me to the District Attorney's office.

[fol. 2420] Q. About how far was the place where you lived from the District Attorney's office?

A. Well, I wouldn't know how far to say, but out on La Salle avenue.

Q. I beg your pardon?

A. I wouldn't just say how far it is.

Q. Couldn't you give us an idea.

Mr. Williams: We can stipulate about 7 miles.

Mr. Clark: About 7 miles.

Q. How were you conveyed to the District Attorney's office?

A. I think they took me in the police car.

Q. Who rode with you, if you know?

A. I don't remember the officers that rode with me, now.

Q. Well, was anything said to you concerning your wife's death, while you were riding?

A. I don't remember.

Q. Well, didn't—I withdraw that. When you reached the District Attorney's office, were you taken to Mr. Fitts' room directly, or to some other part of the building?

A. I was taken back to the Bureau of Investigation.

Q. How long were you kept there?

A. Well, it seemed to me I was kept there two or three hours.

Q. Do you know who was there with you, if anyone?

A. Well, there were several officers there. I think Mr. Littleton was there and I think a man that operated the [fol. 2421] dictaphone was there and there was another man there at two or three different times.

Q. Now, was anything said to you while you were there?

A. No, they didn't talk to me much while I was there.

Q. And after being in the Bureau of Investigation some time, you were taken to Mr. Fitts' room?

A. Yes, sir.

Q. And you saw a number of men there?

A. That is right.

Q. And at the time, before being taken to Mr. Fitts' room, did you ask to have your attorney communicated with?

A. Yes.

Q. And when did you first ask in regard to that?

A. I asked the arresting officer.

Q. When?

A. Sunday.

Q. Did you state whom your attorney was?

A. Yes, sir.

Q. Did you ask to have him communicated with at any time after the time of your arrest?

A. Yes.

Q. When did you next make the request?

A. I asked them again the night they were taking me up to the District Attorney's office to question me in regard to my wife's death.

Q. Now, at the time that you made that request, did you know Mr. Silverman's telephone number?

[fol. 2422] A. I had his office number.

Q. Did you give that office number to anyone and request that he be communicated with?

A. I gave it to Mr. Fitts.

Q. You gave it to Mr. Fitts?

A. Yes, sir.

Q. Did you ask Mr. Fitts that you might have your attorney present?

A. Yes, sir.

Q. And what did Mr. Fitts say, if anything?

A. He said he called Mr. Silverman and found that he was out of town and then I asked for Mr. Parsons and he said that Mr. Parsons didn't know anything about the case and it would take too long to look the transcript over and he couldn't see me.

Q. Then they started to question you in the District Attorney's office?

A. Yes, sir.

Q. And now, prior to your getting to the District Attorney's office, were any threats in the District Attorney's office made to you in connection with your making or not making a statement?

Mr. Barnes: That is objected to as calling for a conclusion of the witness?

The Court: Overrules.

A. You mean in regard to my wife's death?

By Mr. Clark:

Q. Yes.

[fol. 2423] A. Read the question again, please?

(Question read by the reporter.)

Mr. Clark: May I reframe that question? That is not what I intended to ask.

Q. Mr. James, before you reached the District Attorney's office did anyone make any threats in connection with your making any statement concerning your wife's death?

Mr. Barnes: That is objected to on the ground it calls for a conclusion of the witness.

The Court: Overrules.

Mr. Barnes: We have no objection to what was said.

The Court: I think the form, as to whether there were any threats, or statements of that sort used, and as to whether the statement was voluntary—

Mr. Barnes: As to being free and voluntary—very well, your Honor.

The Court: —basically they do call for a conclusion, but I think they are properly called for.

Mr. Clark: It is like one of those conclusions of facts, your Honor, like a man being drunk. Go ahead, Mr. James.

A. Well, I was threatened when I was first arrested on the murder charge, and I was threatened when they took me to the District Attorney's office.

Q. Well, there is some confusion. I am referring now to the day of your arrest, and to the period before you reached the District Attorney's office on that day. Weren't [fol. 2424] you taken to the District Attorney's office an hour or so after you were arrested?

A. On what charge?

Q. Never mind what charge. When the officers first took you into custody, didn't they take you to the District Attorney's office in an hour or two?

A. Yes.

Q. Now, during that hour or two, when you had been taken into custody, and before you were taken to the District Attorney's office, were any threats used upon you, in connection with any statement, or refusal upon your part to make a statement concerning your wife's death? Just answer that "yes" or "no".

A. Yes.

Q. Who made those threats?

A. Mr. Southard and Charlie Griffen.

Q. And what threats did each of them use?

A. Well, when they arrested me, and taken me next door,

they told me that they were of the opinion, and had known about my killing my wife, and I had just as well confess it to them, or they were going to beat the Hell out of me.

Q. Now, were any more threats made by any one before you reached the District Attorney's that day?

A. I don't remember.

Q. Very well. Now, note carefully the question: Was any promise made, or any statement made of any advantage [fol. 2425] that you might gain, if you would make a statement concerning your wife's death, before you reached the District Attorney's office on the day you were arrested, personally?

The Court: You may answer that "yes" or "no", first.

A. Well, no; it was after.

By Mr. Clark:

Q. Now, after you reached the District Attorney's office, and before you were taken into Mr. Fitts' room, did any person make any statement to you concerning any advantage, either then or thereafter, that you might gain, if you would make a statement concerning your wife's death?

A. Before I had reached the office?

Q. Before you reached Mr. Fitts' room?

A. No.

Q. Now, when you were in Mr. Fitts' room, was any statement made there concerning any advantage which you might gain, or any punishment you might escape if you made a statement concerning your wife's death?

A. No.

Q. While you were in Mr. Fitts' room were any threats of any kind made?

A. Not at that time.

Q. Were any threats made in the District Attorney's office while you were being taken to Mr. Fitts' room?

A. Not that I remember.

Q. Just a moment. Now, during the time you were there [fol. 2426] in Mr. Fitts' office, did you tell—I believe I misstated that. Now, while you were in Mr. Fitts' office, were any questions asked you regarding your wife's death? I refer now to the first time that you were in Mr. Fitts' office.

A. Why, yes, they questioned me about her death.

Q. And will you state whether or not you told him that you did not want to discuss it?

A. Yes, I told him. I didn't want to discuss it.

Q. When you told them that, they kept on questioning you?

A. They questioned me quite a little while.

Q. You mean by that they didn't stop?

A. No.

Q. About what time of day was it when you left the District Attorney's office?

A. That day?

Q. Yes.

A. I think it was along in the afternoon, 4:00 or 5:00 o'clock.

Q. And I believe you have already told us you were taken down to the house next to the house where you had been living?

A. That is right.

Q. And were handcuffed while you were being taken there?

A. No.

Q. Do you know who went with you down to that house?

A. I think Mr. Southard and Charlie Griffen were taking me down there.

[fol. 2427] Q. And upon reaching there, what did they do? What did they do?

A. Well, they took me in and set me down, and pulled down the shades in the house, and began to question me.

Q. What were they questioning you about?

A. My wife's death.

Q. And did you answer those questions?

A. I did answer everything they asked me.

Q. And then what happened?

A. Well, they kept that up, I think, until Wednesday morning, but the record says Tuesday, so they kept it up until Tuesday morning constantly.

Q. And Mr. Griffen and Mr. Southard were there with you all the time?

A. No, they were not there all of the time. They had, I think, 15 or 20 officers took me on reliefs about every three hours.

Q. Well, what time did they allow you for sleep?

A. I didn't get any sleep.

Q. Now, during the course of the conversation, did they offer you any reward, or anything of value, or make any

promise to you of anything, of any gain that you might get if you would make a statement implicating yourself in your wife's death?

Mr. Barnes: Just a minute. That is objected to, if the Court please, on the ground that it is indefinite as to [fol. 2428] which particular time counsel is inquiring about, and it is in the course of the confession.

The Court: I think that did have that tendency, Mr. Clark.

Mr. Clark: I asked that inadvertently, and I did not intend to, and the question is withdrawn.

Q. In the course of the conversation is what I intended to say, before you were brought to the County jail, at that house, and after you had been at the District Attorney's office, did any one hold out any hope of reward, or promise of immunity, or any advantage of any sort, that you might gain, if you would make some statement implicating yourself in your wife's death?

A. Well, Mr. Williams——

Q. What did Mr. Williams say?

A. Well, he told me that they had enough stuff on me to hang me, and that they were going to hang me for it, and that he had the authority to give me a lighter sentence if I would come clean and tell him the full story about it. He told me that if I would tell him the truth about it that he could get me a life sentence, and that he might get me off at manslaughter, if I would tell him the story.

Q. Now, about what time of day or night did this conversation with Mr. Williams occur?

A. Well, it was way in the night; I think maybe 3:00 or 4:00 o'clock in the morning.

[fol. 2429] Q. And it was a Sunday, as I understand, that you were taken into custody?

A. That is right.

Q. And this was along in the early hours of Monday morning?

A. It was either Tuesday morning, or Wednesday morning.

Q. Now, you spoke about Mr. Southard and Mr. Griffen using physical force on you. Will you tell us how that came about?

A. Well, they had been questioning me every minute, the same questions over and over, since I had been there. And

either Monday night, or Tuesday night—I have the two days confused—about 10:00 o'clock he was trying to get me to admit that I spent the night with some woman in the hotel on the 11th of August, and I didn't know what he was talking about.

Q. Who was talking?

A. Mr. Southard. Finally he said that I was lying like a dog, and he began to beat me.

Q. How long did he continue to beat you?

A. He jumped over and began to beat me, and I got hold of him, and he stopped, and then he jumped over and began beating me again. When I stopped him, Charlie Griffen knocked me loose. I told them that I had answered every question, and I didn't know what they were talking about when they were talking about this woman. And he began [fol. 2430] to question me about it again, and then several minutes later he did it again, and I grabbed hold of him again, and Charlie Griffen knocked me loose. I said, "There is no use to beat me." I told them if they wanted me to say that I stayed in the hotel with this woman I would say it. They were not satisfied with that. If they asked me a question, and if I answered it, he hit me, and if I attempted to explain, or did not answer, he would hit me. And he turned me over in that chair several times.

Q. Now, finally what did you do, as the result of the physical force that was used upon you there?

A. Well, they finally quit beating me sometime in the night, and then Mr. Williams takes hold of me and told me if I confessed I would get less punishment, and that I might get a life sentence. I told him that I couldn't tell him anything about it.

Q. And how long after talking to Mr. Williams, how long was it after that you were taken to the County jail?

A. About the time that Mr. Williams got through talking to me I collapsed, and I didn't know anything until the next day.

Q. You mean that you fainted?

A. Yes, I fainted, or passed out.

Q. At what time the next day, as near as you can tell us, was it that you regained consciousness?

A. Well, I came to the next morning. I think it must [fol. 2431] have been 8:00 or 9:00 o'clock.

Q. Were you at the same place?

A. Yes, sir.

Q. Were the same people there?

A. Well, I don't just remember who was there. There was an officer named Davis there. Whether Mr. Southard and Griffen were there, I don't know.

Q. Now, were any further threats made to get you to make a statement concerning the facts of your wife's death while you were at the house—we have got to the point now where you regained consciousness—

Mr. Barnes: As to the form of the question it is objectionable.

The Court: Yes, it is objectionable. You can change the question.

Mr. Clark: Yes, your Honor.

Q. Were any further questions asked you by any one concerning the circumstances of your wife's death, after you regained consciousness, and before you were taken to the County jail?

A. Well, I was pretty groggy when I regained consciousness, and I hardly remember what was said there.

Q. And then you were taken to the County jail, as I understand it, about the 21st of April, and remained there, except when you were taken out to court and the Grand Jury until the 2nd day of May, is that about as you remember it?

A. Yes.

[fol. 2432] Q. And on the 2nd day of May you were taken into the Chaplain's room, Mr. Southard, Mr. Griffen and Mr. Killion, and Mr. Lynch—is that the name?

Mr. Barnes: Lynch was the court reporter.

Mr. Clark: Yes, Lynch was the court reporter.

Mr. Williams: May I interrupt, Mr. Clark? While I haven't any objection to the asking of leading questions, I think at this time the witness should be required to make his own statements instead of simply answering "yes" or "no" to counsel's statements.

Mr. Clark: I tried to avoid leading questions except in a matter such as this, where I believe the question is purely preliminary and I was asking it in the interest of time.

The Court: You may proceed. If there is any objection to your question we will take the objections up as they come.

Mr. Clark: Is that right? Do you remember the incident, whatever date it was?

A. I remember going to the Chaplain's room, yes.

Q. And did you see Mr. Griffen and Mr. Southard there at that time?

A. Yes.

Q. Did you recognize them?

A. I did.

Q. Will you state whether or not you still had a memory of the physical force that had been used upon you before?

A. I will always remember that.

[fol. 2433] Q. Will you state whether on that second of May you were still suffering pain from the injuries you had received?

A. I was.

Q. At the time you were taken to the jail, besides this hernia, did you have any marks or bruises on you as the result of the force that had been used?

A. Do you mean when they first put me in jail?

Q. Yes.

A. Yes, I was black and blue from my waist up.

Q. Was any part of your head or face injured?

A. Yes, both of my ears were swollen so that I couldn't hear.

Q. What was the condition of your ears on this day when you were taken to the Chaplain's room?

A. I think my ear was still black then.

Q. By the way, had Mr. Silverman, before you were taken to the Chaplain's room, given you any instructions as to what you should do if you were questioned further by the officers?

A. He had.

Q. What instructions did he give you?

A. He told me I was going to be indicted for murder and if the officers questioned me to tell them that I wouldn't talk unless he was there.

Q. When Mr. Silverman told you that you were going to be indicted for murder, did you believe that you would be?

[fol. 2434] A. I did.

Q. Now, when you were taken into the Chaplain's room, what effect upon your mind did the presence of Mr. Southard and Mr. Griffen there have?

A. Well, I thought I was in for another beating.

Q. And did you feel free to talk in their presence?

A. No, I did not.

Q. Now, what effect did Mr. Silverman's instructions have upon your mind? Did you feel that you should follow those instructions?

A. I felt that I should do just what he told me.

Q. Then taking the circumstances as they existed at the time you were in that room when Mr. Williams told you what he claimed Mr. Hope had said, did you feel free, under the circumstances as you knew them to deny the truth of the statement that Mr. Williams communicated?

A. I was afraid to deny it.

Q. And now, do you recall a second occasion when you were taken to the District Attorney's office?

A. I do.

Q. With relation to the time you were in the Chaplain's room, when was this second occasion?

A. It was on a Saturday; I don't remember the date.

Q. Do you remember whether it was the same day, before that day or after the day that you were in the Chaplain's room?

[fol. 2435] A. It was the same day I was taken to the Chaplain's room.

Q. About what time of day was it you were taken to the District Attorney's office?

A. I think it was shortly after noon.

Q. Who took you over there?

A. I believe Mr. Gray took me over there; I am not sure.

Q. He is one of the deputy sheriffs, is he?

A. He is.

Q. Works with Mr. Killian?

A. He does.

Q. And now, to what part of the District Attorney's office were you first taken?

A. I was taken to Mr. Fitts' office.

Q. And did you, at any time, see Mr. Southard there?

A. Yes, he was there.

Q. When did you see him?

A. He was there practically all the time I was there.

Q. And when you reached Mr. Fitts' office, besides Mr. Southard, was there anyone else in there that you remember?

A. Yes, sir.

Q. Who else did you remember being in there?

A. I remember Charlie Griffen being there and most all the officers that I had seen were there.

Q. And now, will you state whether or not at any time [fol. 2436] you had a conversation with Mr. Southard in which just you and Mr. Southard took part?

A. State what the conversation was?

Q. No, just state whether you had such a conversation first.

A. I did.

Q. With reference to the time you were taken into Mr. Fitts' office when did that conversation occur?

A. It occurred about 10 o'clock that night.

Q. Where were you?

A. I was in one of the offices there; I don't know whether it was Mr. Fitts' office or the one next to it.

Q. Was anyone else present besides you and Mr. Southard?

A. No, they all cleared the room and left me with him.

Q. What did Mr. Southard say to you then?

The Court: Just a moment, do I understand that this is subsequent to the matter the admissibility of which is involved?

Mr. Clark: Yes, your Honor. In going into matters subsequent to that I directed your Honor's attention to that specifically, the thought that a subsequent statement to the date which this evidence relates would come before your Honor sooner or later, and unless counsel objected, I would go into it now.

The Court: Strictly speaking this is not voir dire testimony now.

[fol. 2437] Mr. Clark: No, it is not.

The Court: You may proceed.

Mr. Williams: May I make a statement? I don't object to it because I anticipated we could clear the entire matter up before the other statements were offered.

Mr. Clark: I think the Court was just trying to clear up the entire matter. We talked in chambers this morning and I think the Court agreed with me.

The Court: We will take our recess at this time. Counsel may have opportunity to discuss the matter during recess.

At the present time we will leave the question as it is and reserve ruling until after recess.

(Recess.)

(After recess.)

The Court: Let the record show all parties present except the defendant.

Mr. Clark: The defendant is on the witness stand.

The Court: Oh, I beg your pardon. All parties present.

Mr. Clark: Shall I proceed?

The Court: You may proceed.

Mr. Clark: Will you read me the last few questions and answers?

(Questions and answers read by the reporter.)

The Court: This is as to the matter which apparently is not voir dire.

Mr. Clark: Yes, your Honor.

[fol. 2438] Mr. Williams: If your Honor please, I may have been misunderstood. I was not objecting to the question. I merely stated that I understood that sooner or later, in connection with the other matters which would be offered, this would become voir dire and for that reason I was not objecting, your Honor.

The Court: That is all.

Mr. Clark: I might say, your Honor, that in the case of *People vs. Freedman* we had offers of alleged confessions, a series of alleged confessions and a series of voir dire examinations and the record was quite confusing, and I thought it would make a more orderly record if we could do this as we are doing it here.

Mr. Williams: That is satisfactory.

Mr. Clark: I may say, Mr. Williams, that when the proper time comes you may rely upon me to stipulate that the evidence as to these conversations is to be deemed voir dire examination as to the conversation you wish to offer.

Read the question to the witness so that he may answer it, Mr. Reporter.

(Question read by the reporter as follows: "What did Mr. Southard say to you then?")

A. I sat at the desk and he said to me, "You have been sitting here lying to Fitts all evening just like you lied

to me when I had you out at the house." He said, "I didn't have the dope on you then, but I have got it on you now," [fol. 2439] and he said, "You are going to tell the truth here now or I am going to take you back to that house and I am going to beat your God damned head off."

Q. Did you make any answer to that?

A. I told him that I was ill from the beating that I had taken before, that I wasn't able to take another beating and that if he wanted me to say what he was relating to me in Hope's story there that I would gladly admit it and save myself other punishment.

In addition to the testimony of the defendant, Officer J. C. Southard, who was one of those in charge of the investigation, admitted that he had used physical force upon the defendant. (Rep. Tr. 1089-1090.)

Q. And during that time, also, you also used some physical force upon him?

A. I did not. That was in the other case.

Q. You say that was in the other case. You mean that some physical force was used upon him while he was in your custody, and you attributed the physical force to the other case, is that right?

A. I slapped his face in the other case.

Q. Slapping his face is the only thing you did to him?

A. That is right.

Q. What day did you slap his face?

A. I think it was on a Monday morning, the 20th of April.

[fol. 2440] Q. That would be the day before he was delivered to the County jail?

A. Yes.

Q. Did you present him in the County jail, when he was taken there?

A. I did.

Q. Did you notice any marks or bruises upon his face or head when he was taken into custody?

A. Not that I recall.

Q. Well, you did notice marks and bruises upon his head when you took him to the County jail, didn't you?

A. No, I don't believe so.

Q. Weren't both of his ears bruised and swollen at that time?

A. They were not.

Q. Neither one of them?

A. That I wouldn't say; one may have been. I wouldn't be positive. I know that both were not.

He admitted that he saw bruises on the defendant and that one of the ears of the defendant was swollen at the time the defendant was indicted on this charge. (Rep. Tr. 1091.)

Q. You saw the bruises here when he was in court?

A. The left ear was a little bit swollen at the top.

[fol. 2441] We respectfully submit, therefore, that under authority of *Brown v. Miss.* the defendant's rights under the Due Process Clause of the Fourteenth Amendment to the Constitution were violated. The entire proceedings are void and require a reversal of the judgment.

Every agency of the State is covered by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. *Mooney v. Holohan*, 294 U. S. 103.

III

That Prolonged Questioning without Sleep and under Tortu-ous Mental Ordeal, Similar to that Employed in the Dark Ages, and in the Torture Chamber, were Used upon the Defendant, and Statements thus Extorted and Coerced were Permitted in Evidence in the Trial. That the use the Alleged Confession in Evidence Obtained by of These Methods was in Violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

In *Rounds v. State*, 106 S. W. (2d) 212 (June 10, 1937) the court held that use of confessions obtained from a defendant who had been deprived of sleep is no less severe a form of torture to obtain a confession than physical violence, and that the use of such means of torture to obtain a confession is violative of due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution and vitiates the verdict.

[fol. 2442] In that case the court said:

"To deprive a human of sleep for four days and nights is a form of torture not less severe than physical violence. See *Ziang Sun Wan v. United States*, 266 U. S. 1, 45 S. Ct.

1, 69 L. Ed. 131. The effect of this treatment on Rounds is apparent from uncontradicted testimony as to his physical condition just after his confession was obtained. The sheriff and all the officers testified that Rounds went into a religious frenzy, said he was talking to Jesus, began shouting and demonstrating as if at a negro camp meeting, and generally making so much noise that the officers called in the county physician about daylight Friday morning shortly after the confession had been procured.

This physician corroborated the testimony of the officers as to the condition of Rounds, and the doctor thereupon found it necessary or proper to administer to Rounds a hypodermic injection of one-half grain of morphine to quiet him down.

The officers testified that Rounds put on this demonstration because he claimed to be happy to have gotten the load of guilt off his mind by the confession. The substance of [fol. 2443] Round's testimony is that he was happy because the efforts of the officers to make him confess had ceased.

Whether the officers subjected this defendant to physical violence was a matter of controversy on the trial below and we need not go into that. That the officers did subject him to a course of treatment—keeping him awake as stated—that rendered him hysterical and necessitated the attendance of a physician is perfectly obvious.

A confession so obtained is not admissible. Resort to torture, in any form, by officers of the law, is not to be countenanced.

In *Brown v. Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682, the Supreme Court of the United States has recently held that the use of a confession obtained by torture is a denial of due process under the Fourteenth Amendment to the Federal Constitution, and we think it immaterial whether the torture was administered by brute force or by some method more refined. See, also, *State v. Fields*, 7 Tenn. (Peck) 140; *Ann v. State*, 30 Tenn. (11 Humph.) 159; *Deathridge v. State*, 33 Tenn. (1 Sneed) 75, 76; *Strady v. State*, 45 Tenn. (5 Cold.) 300; *Self v. State*, 65 Tenn. (6 Baxt.) 244."

Under Point II, we have shown the physical force used. [fol. 2444] We point out the following facts, which are uncontradicted in the case at bar:

The defendant was constantly questioned, without being permitted to sleep, and after he had been struck, for fifty hours of continuous questioning in which a number of officers and State Agents took part. He was not permitted to go to sleep during this prolonged interrogation. The questioning continued in the absence of any attorney representing the defendant. He was not permitted to communicate with or have any attorney or other person present, in itself a violation of due process of law, guaranteed by the Fourteenth Amendment of the Constitution of the United States.

“The State may not deny to the accused the right of counsel.” *Powell v. Ala.* 287 U. S. 45. “The right to counsel is a right a person has at any stage of the proceedings and under the laws of the State of California he is entitled to the aid of counsel immediately upon his arrest, and an officer of the law who fails to send for counsel is guilty of a misdemeanor and also subject to a fine.”

1. The alleged confession was made to officers having appellant in forceful custody.

2. It was made after appellant had been severely beaten about the body and head.

3. It was taken after prolonged and hideous mental torture. [fol. 2445]

4. It was taken in absence of appellant's attorney and in violation of his right to be represented by counsel at all stages of the proceedings.

5. It was taken after hours of continuous questioning. Before that he had been held in custody for over forty-eight (48) hours without being taken before any magistrate or given the aid of advice of counsel. He was subject to almost continuous interrogation while his captors worked in relays, some of them sleeping while others continued his interrogation. (Rep. Tr. 1450.) While he was so held force was used upon him when his statements displeased one of his captors.

6. No confession was ever made by him to any friend or disinterested person and as soon as he was out of the tortuous custody of the officers he disavowed the purported confession.

7. Part of the time during interrogation he just sat and stared blankly without answering. (Rep. Tr. 1103.)

8. On such occasions, after his failure to answer, the interrogation continued with the same line of questioning.

9. After having been beaten and questioned incessantly for hours, he was threatened with further beatings if he did [fol. 2446] not confess the crime with which he was charged.

With respect to the questioning of Lisenba, we quote from the opinion in *People v. Lisenba*, 89 P. 2d 39, as follows:

“ * * * As a result of these developments the defendant was arrested on April 19, 1936. He was not taken without delay before a magistrate nor was he immediately incarcerated in the county jail as required by sections 849 and 1597 of the Penal Code. Instead, and after some preliminary questioning in the office of the district attorney, he was taken by the officers to a private home, adjoining that where the defendant had been living with his niece, and where admittedly he was held incommunicado for a period of about forty-eight hours, during all of which time he was admittedly subjected to incessant questioning by the officers who worked in shifts. The defendant was apparently deprived of rest and sleep during practically all of such period. At least, the prosecution failed to offer any positive testimony that defendant during this period was afforded an opportunity of going to bed, a privilege concededly enjoyed by the examining officers. In addition, one of the officers testified that during the questioning he became angered and “slapped” the defendant’s face when [fol. 2447] the defendant was said to have referred to the deceased as a “whore”.

The foregoing statement refers to what took place before Lisenba was booked and lodged in jail.

The dissenting opinion of Justice Seawell describes what took place from that time until the alleged confession, upon which the state relied, was taken. Justice Seawell’s opinion reads:

“ * * * Southard said he gave instructions that James was not to be left alone at anytime; one or more investigators was questioning him at all times; some questions he answered and some he refused to answer; he would just sit

and look blankly. Southard testified that he had three meals a day but James testified that he was practically starved into a state in which he told the investigators that he would answer any question in any way that the investigators wanted him to answer it. It is the admitted fact that he was interrogated by the district attorney and his assistant, Mr. Williams, at all hours of the night, for as many as two and a half to three hours. One period continued from one o'clock to six o'clock. The officers also took part in interrogating the defendant. The plan adopted was that the investigators worked on the defendant to a point where it [fol. 2448] was deemed expedient or advisable to take him before the district attorney and if satisfactory progress had not been made he would be returned to the private custody of the investigators for the employment of such methods as would work a change of mental attitude on the part of the defendant. No other possible answer could be made to their unauthorized action which only ended with the procurement of the alleged confession. At times numerous officers would be present and sometimes, James testified, he was left with but one officer. The evidence adduced by the prosecution affirmatively shows that the defendant was shifted back and forwards in the manner herein described many times at all hours of the day and night, continuing over a long inquisitorial period. At times Hope was brought into the room, and engaged James in controversial disputes.

Officers, Killian, Gray, Griffen, Littleton, Davis and Southard were most active in procuring the alleged confession of James. The first signs of a confessional collapse, as told by Killian, occurred at midnight, May 2, thirteen days after James was taken into custody. At the above hour, in the room adjoining the district attorney's office, James said to Killian, "Why don't we go out and get some- [fol. 2449] thing to eat, and I will tell you *the story*." The conference began at about one in the afternoon and ended at about 2:30 or three o'clock the following morning—a short intermission having been taken for coffee and sandwiches. * * *

"James testified at the trial that practically everything he told Killian, Southard and the district attorney concerning the death of his wife was the story which the investigators had drilled into him for hours for several days. He said he was not able to stand further beatings and physical

punishment with which he was threatened; that if he gave an answer to a question which did not suit the questioners he was struck on the head. He had also received one or two terrific beatings at the hands of Southard and Griffen; he would have preferred death rather than be returned to the private residence, which the officers threatened to do, where most of the punishment was inflicted. The story he told Killion had been repeated a "thousand" times to him; for days when they repeated to him Hope's story he told the officers that he did not know what they were talking about until he was finally coerced into submission. * * *

"The record shows that at least three members of the district attorney's staff and some ten or twelve investigators [fol. 2450] and officers had to this point been making continuous and vehement efforts to get a confession from James. Immediately James was taken to the district attorney's office by automobile where District Attorney Fitts, Chief Deputy Attorney Stewart, Chief Blummer, Officers Griffin, Jack Southard, Davis, Killion, Gray and Miss Adams, the statement reporter for the district attorney's office, were assembled. Hope was also present. It was then around two o'clock in the morning. James was greeted as follows: Mr. Fitts: "Mr. James, the boys have told me that you told the story." Mr. James: "They have got it." It was suggested by the district attorney that he begin in his own way and relate the story. James answered that it was a very long one and it would take three or four days to tell it. * * *

"It may be noted that during the period of intense questioning which continued throughout several days, no statement reporter was present to report the methods by which the confession was attempted to be induced. * * *

"It was only when the time was deemed ripe for a confession that a reporter was called in to report the proceedings and in no instance were the preliminary things done [fol. 2451] and said, which caused or forced the alleged voluntary confession, made to appear as a part of the report. These important matters, so far as referred to at all, rest in parole. Neither was the defendant properly advised as to his rights or permitted to have independent advice or counsel at the times when the exercise of such rights would have been of benefit to him. * * *

"It is true that several officers testified in terms of conclusions that no violence was inflicted upon the defendant

or promises of immunity were made to him in their view or to their knowledge, but this does not meet the situation. Some were not called to testify and others may not have been present at the times the physical punishment was used. From the record before us the conclusion is irresistible that unlawful means were employed by concert of action from the first to the time defendant made the alleged Killion statement to force a confession. The burden cast by law upon the people was not met. The case of *People v. Dye*, 119 Cal. App. 262, 269, 273, 6 P. 2d 313, 316, is directly in point here. Dye was convicted of murder in the second degree. The defendant, being suspected of murder, was taken into custody and confined in the Beverly Hills police station after the same fashion as the defendant here was [fol. 2452] held in custody by the officers at a private residence. Precisely the same kind of method—though by no means as extreme—were adopted there to coerce a confession from the defendant as were adopted in the instant case. Mr. Justice Conrey, then Presiding Justice of the Second Appellate District, Division One, District Court of Appeal, was the author of the opinion which reversed the judgment of conviction and the order denying a new trial.

“In discussing the methods by which the confession was procured, the late Justice Conrey said in part: “It shows a persistent questioning of the defendant about various matters, many of which related to the tragedy * * * including a direct charge, which defendant denied * * *. During the night the defendant became weary and sleepy (in the instant case he became not only sleepy but fainted), but the questioning went right on. Officer Gray admitted that twice he told the defendant ‘to sit up in his chair’; that the defendant ‘may have been nodding; he was not asleep.’ In view of the inquisition that was going on, and the condition of the prisoner, these orders were in effect a kind of coercion. The circumstances of the questioning, and the [fol. 2453] method thereof, were well calculated to force a confession of guilt, but the process was not at that time successful. It was only after six hours more of questioning * * * followed by three days more of secret imprisonment, that the confession was finally obtained * * *. Considering the wearing-out process of inquisition, the secrecy of the imprisonment, the isolation of the defendant, and the unlawful failure to take the defendant before the magis-

trate (Pen. Code, 821, 824, 849, and 145), the transaction has all the earmarks of a deliberate attempt to force a confession by every means short of promises, direct threats, or actual violence. (In the case at bar a direct act of violence in at least one instance is admitted. As to others the evidence is quite convincing.)”

“After discussing the fundamental rules governing the voluntary character of confessions, the decision turns to the claim that the confession having been made a few days after the effect of improper methods had ceased to operate on the defendant’s mind, the evidence thereby became admissible. The decision continued: “It is also true that if threats and inducements are made to a prisoner, *and within* [fol. 2454] *a few days thereafter* he makes a confession, such acknowledgment of the commission of the crime may not be introduced in evidence, unless it clearly appears that the threats and inducements had ceased to operate upon his mind to bring about his statement of his own guilt.” (Citing a number of decisions of our own and appellate court decisions.)

“The following pertinent paragraph concludes the discussion: “The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. “It is an essential part of justice that the question of guilt or innocence shall be determined, by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.” (Opinion written by Mr. Justice Sloss in *People v. O’Bryan*, 165 Cal. 55, 130 P. 1042.) *People v. Wilson*, 23 Cal. App. 513, 524, 138 P. 971, 975.”

IV.

That the Principal Evidence Against the Defendant Was that of an Alleged Accomplice Named Charles H. Hope. That Since the Trial the Said Charles H. Hope Has Made Affidavits and Filed the Same in the Superior Court of Los [fol. 2455] Angeles County, Stating that His Testimony Was Obtained by Deceit, Fraud, Collusion and Coercion and Was Entirely False; that He Was Impelled by Force and Fear, Threats and Promises, and that All These Facts, Including the Falsity of His Statements, were Known to the

Prosecution and Participated in by Them. That Testimony Thus Obtained and the Conviction Based Thereon Make a Trial a Mere Pretense and Are All in Violation of Due Process of Law, Guaranteed by the Fourteenth Amendment of the Constitution of the United States.

In *Mooney v. Holohan*, 294 U. S. 103, 79 L. Ed. 347, the Supreme Court of the United States said that the constitutional requirement of due process is not satisfied where a conviction is obtained by the presentation of testimony known to the prosecuting authorities to be perjured. The court there said:

"It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a [fol. 2456] like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, "whether through its legislature, through its courts, or through its executive or administrative officers." *Carter v. Texas*, 177 U. S. 442, 447, 44 L. ed. 839, 841, 20 S. Ct. 687; *Rogers v. Alabama*, 192 U. S. 226, 231, 48 L. ed. 417, 419, 24 S. Ct. 257; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 233, 234, 41 L. ed. 979, 983, 984, 17 S. Ct. 581.

Reasoning from the premise that the petitioner has failed to show a denial of due process set forth in his petition, the Attorney General urges that the State was not required to afford any corrective judicial process to remedy the alleged wrong. The argument falls with the premise. *Frank v. Mangum*, 237 U. S. 309, 335, 59 L. ed. 969, 983, 35 S. Ct. 582; *Moore v. Dempsey*, 261 U. S. 86, 90, 91, 67 L. ed. 543, 545, 546, 43 S. Ct. 265.

We are not satisfied, however, that the State of California has failed to provide such corrective judicial proc-

ess. The prerogative writ of habeas corpus is available [fol. 2457] in that State. Constitution of California, Art. 1, 5; 6, 4. No decision of the Supreme Court of California has been brought to our attention holding that the state court is without power to issue this historic remedial process when it appears that one is deprived of his liberty without due process of law in violation of the Constitution of the United States. Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that constitution. *Robb v. Connolly*, 111 U. S. 624, 637, 28 L. Ed. 542, 546, 4 S. Ct. 544. In view of the dominant requirement of the Fourteenth Amendment, we are not at liberty to assume that the State has denied to its court jurisdiction to redress the prohibited wrong upon a proper showing and in an appropriate proceeding for that purpose."

Again, in *Jones v. Commonwealth of Ky.*, 97 Fed. (2d) 333, the Circuit Court of the United States held:

"Where falsity of perjured testimony upon which conviction was obtained is discovered after the conviction, as well as where the testimony was known to be perjured when presented, the state must afford corrective judicial process. Const. Amend. 14."

In that case the appellant was convicted of murder and [fol. 2458] sentenced to death by a Kentucky court. Newly discovered evidence offered to the State's Courts in support of the several petitions thereto addressed, cast grave doubt upon the competency and freedom of duress of one and upon the veracity of *the* both of the prosecutions' principal witnesses. The court there said:

"Nor are constitutional safeguards maintained or responsible for the judicial process promoted by convictions secured on perjured testimony."

In that case the court, quoting the case of *Mooney v. Holohan*, says:

"If it be urged that the concept thus formulated but condemns convictions obtained by the state through testimony known by the prosecuting officers to have been perjured, then the answer must be that the delineated requirement of due process in the *Mooney* case embraces no more than

the facts of that case require, and that 'the fundamental conceptions of justice which lie at the base of our civil and political institutions' must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but fortunately not too late its falseness is discovered, and that the state in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired."

In connection therewith, we submit two affidavits filed in [fol. 2459] the Superior Court of Los Angeles County by Charles H. Hope, who testified in this case, and which affidavits set forth in detail that his testimony upon which this conviction was based was perjury and was the result of coercion.

[fol. 2460] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

No. C-64218

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

MAJOR RAYMOND LISENBA (also known as ROBERT JAMES), and
Charles H. Hope, Defendants

AFFIDAVIT OF CHARLES H. HOPE AS TO FURTHER SPECIFIC
INSTANCES OF KNOWING INDUCEMENTS AND USE OF FALSE
TESTIMONY BY DISTRICT ATTORNEY AND HIS DEPUTIES AND
INVESTIGATORS—Filed in Support of Charles Hope's Motion
to Withdraw Plea of "Guilty" and to Set Aside
Judgment

STATE OF CALIFORNIA,
County of Marin, ss.:

Charles H. Hope, being first duly sworn, deposes and says: I make this affidavit to supplement the affidavit and motion filed by me in C-64218, in the above entitled proceeding of People vs. myself and James or Major Raymond Lisenba.

1. I had no idea that said state prosecuting officials secretly and fraudulently intended to use the same false tes-

timony which they induced me to give as aforesaid against me in my own hearing, as well, which they later did by the [fol. 2461] trick and device of a stipulation the meaning of which I was ignorant.

2. Reading these affidavits in connection with what is said in the dissenting opinion of the Supreme Court in *Peo. v. Lisenba*, 97 California Decisions, 378, affiant invites attention to at least three specific instances of violation of law by State prosecuting officials referred to, to wit: section 137 and other sections of the penal code, "upon understanding and agreement that the testimony of said witness shall thereby be influenced or who *attempts* by any *other means* fraudulently to induce any person to give false or withhold true testimony is guilty of a felony"; and in this behalf, affiant invites attention to the fact that the forcing of confessions from James and affiant both, and the attempt thereby to induce both of us to give false testimony is also a felony of and in itself. Affiant avers that his own conduct in giving such testimony *was* so induced was not wilful, but excusable because given under duress of threats of death by hanging, as well as false promises referred to.

3. The three specific instances, among others, of the knowing inducement and use of false testimony by state officials is as follows:

1. That the snake bit and poisoned the decedent, thereby enabling the state to supply a missing vital and material element of the corpus delicti of the offense charged, when the said district attorney and his deputies and investigators [fol. 2462] knew the same to be false, knew that affiant knew it to be false, and which affiant knew to be untrue;

2. That no promises of leniency or reward had been made to affiant, to induce his testimony;

3. That no threats had induced the false testimony: in instances "2" and "3" entering into the deceit practiced on the Court and jury, and being material evidence going to the credibility of the witness and the weight to be given by the jury to the witnesses testimony.

A number of other specific instances can be stated as to forcing me to testify that the woman moved or let out a sound and showed signs of life, to prove she was alive, at the

time they claimed she had been bit by the snake; and inducing me to place the time of my arrival at the house several hours earlier, and to supply other deficiencies in their proof.

Affiant avers that said state prosecuting officials practiced collusion on the court and jury in attempts to give credence to the State's theories and case, (quoting from dissenting opinion, (399 to 469) "If death was in fact caused by an attempt to perform an abortion, he would not have thrown away an opportunity to avail himself of that defense", and practiced collusion also by the false representations upon the trial to the court and jury that affiant's testimony was free and voluntary and not exacted by promises of immunity but "having been moved solely by the promptings of conscience, and not at all induced by [fol. 2463] promises or understandings", as pointed out to be material by the Supreme Court at p. 403 of said Opinion; and that as a part of said practice of deceit, deception and collusion, one of said court officials, *as a part of such prearrangement and design* to improperly influence the jury and to further this deception, could hardly control himself when Judge Fricke went off half-cock and found me guilty of first degree murder, but dashed by me on the stairs, unlocked the jury door and told the jury then deliberating James' case that mine had been set at first degree murder." That this was part of the pre-conceived plan to improperly influence a verdict and was done in order to lend credence, and to dissipate suspicion that the thing was not woolly above-board but induced by promises and as the result of collusion and a collusive understanding and connivance between the state prosecuting officials and affiant. This was also done to buttress and strengthen the state's argument to the jury (p. 403 of the Opinion: "That if the abortion theory was true, Hope would have been a foolish man to have entered a plea of murder in the first degree with a possibility of suffering the extreme penalty"; and the announcement that affiant had been found guilty of murder in the first degree amounted to the giving of evidence to the jury in an unlawful manner, with the covert purpose of unduly and fraudulently influencing their verdict, in connection with said other acts and said conduct forming [fol. 2464] a part of *and* overt acts under said general scheme and pre-conceived plan, design and conspiracy to

obstruct and pervert the administration of justice and to improperly influence a verdict.

That affiant was induced to give false testimony by said state prosecuting officials which they knew to be false, which he knew to be false, and which they knew that he knew to be false, and that they did so with the corrupt motive and purpose of supplying defects in their evidence and to improperly and thereby unlawfully convict both affiant and his co-defendant of murder in the first degree, as well as to keep from the jury the due consideration of any lesser offense included in the charge or shown by the evidence, under the improper mandatory instruction obtained of the Court that "if it returned a verdict of guilty, it could not be less than murder of the first degree" (p. 403 Opinion). Also to avoid a fatal variance between offense charged and the evidence, requiring a dismissal of the case.

Affiant avers that he was informed by his counsel, Mr. Cuff, a public defender co-operating with the district attorney in the disposition of criminal cases, that said counsel had been informed by Eugene D. Williams, Deputy District Attorney then in charge of the case, that they (the State) had "nothing" "nothing on" affiant, that your affiant believed and relied on said statement which was knowingly falsely made to deceive your affiant, that your affiant was thereby misled and deceived and taken by surprise, and as [fol. 2465] he wrote Judge Fricke later protesting the action (letter of affiant to Judge Fricke, May 19, 1937, replied to by said Judge on June 10th, 1937, Exhibits —, annexed to first affidavit, hereby made a part hereof by express reference in this connection), affiant was "dumbfounded" when the court summarily pronounced him guilty of 1st degree murder; that said Mr. Jack Southard and other deputy district attorneys or investigators, with knowledge of all other state prosecution officials, had falsely represented to his affiant and led him to believe that he and they would take the stand in behalf of affiant and introduce evidence of innocence in his behalf and use their best efforts to secure his release; that all of said promises were wholly false, made to deceive affiant, did deceive affiant, and were made corruptly to influence and induce said plea and his said testimony as aforesaid; and did induce same; and same are here set forth as facts and circumstances of fraud; that affiant did not know that his plea of guilty could and

would be received as a confession of murder in the first degree or murder and he did not intend it as such, but only as a subterfuge or arrangement under his understanding or believed understanding with the state prosecuting officials under which he would later possibly be found guilty of a minor offense such as failing to properly or promptly report as to the facts, or possible complicity in an attempt of some kind to conceal evidence, if affiant was guilty of any crime or misdemeanor, which he does not believe he [fol. 2466] was; that affiant was taken advantage of and thereby by fraud deprived of a trial and right of trial on the merits, in circumvention and violation of his rights under sec. 13 Article I California Constitution and the Fourteenth Amendment to the United States Constitution; that for this reason the proceedings and judgment are void, as the law does not countenance a district attorney thus manufacturing false evidence to imprison.

I aver that said plea of guilty, said testimony on the trial by me, my statements to the prosecuting officials before and at the trial, and the said judgment were all secured by said state prosecuting officials by the practice of deception and fraud by the said officers on the court and jury and upon me; I aver that the said plea of guilty and said judgment and said false testimony were all procured and induced by said state prosecuting officials by the exercise of intimidation upon me. I further aver that I informed representatives of said district attorney before and after the trial in substance as follows: "That Stuff About Snakes is the Bunk: The Snake Never Bit the Woman and You Know It." That the said snakes were first introduced into the picture by the investigators of the district attorney's staff, and as affiant earnestly believes had nothing to do with the cause of death.

I do therefore intend to and do hereby revoke and repudiate all of said statements and testimony as having been induced by fraud, duress by threats of hanging and [fol. 2467] imprisonment, and fear, and as not having been free and voluntary, and as having also been induced by false promises of immunity and release made by said state prosecuting officials to me, which have never been kept, and do further aver that said state prosecuting officials even up to within a short time ago, to wit, November, 1938, at San Quentin, California, repeated to me their promises and said

to me, "We Will Keep Our Word: You *keep quiet*." Affiant avers that thereafter said state prosecuting officials wrote a letter to a chaplain at the prison, repudiating their promises and denying same and stating they would oppose any effort affiant makes to upset the case;

As a specific instance of intimidation and duress inducing said false testimony, affiant avers that just before going into the court-room to testify, the state investigators threatened him, saying: "*Now you be damn sure that you swear that the snake struck at the woman and bit her foot*", also, "*Be sure you testify that we have made you no promises, and that the snake struck at the woman's foot,—you are not out of this yourself*", and thereby sought to and did put affiant in fear and thereby attempted to and did induce him falsely to testify that those were the facts; that affiant was thereby put in fear by said threats and intimidation and solely because of fear and said promises, he testified as to the snake incident, falsely, against his will and wish, and over his protest to said district attorney and his [fol. 2468] staff that it was not true in so far as him being an eye-witness; affiant avers positively that said state prosecuting officials knowingly compelled him to give false testimony to material facts in issue on said trial, and not having before him a copy of the reporter's transcript, and it being impracticable to separate each question and answer to identify the true from the false, affiant takes the course of repudiating the testimony as false and fraudulent, in toto, that is in whole. Affiant avers that for many hours and days at a time he was subjected by said state prosecuting officials to a persistent course of threats and insistence that he give false testimony and testimony as above mentioned which he told them was not true, which affiant knew to be untrue, and which they knew to be untrue and knew that affiant knew it to be untrue, to remedy certain defects in their case and to supply the insufficiency of their evidence to make out the corpus delicti (body of the offense of murder by snakes charged); that thereafter they also fraudulently used this same false testimony against affiant himself by "stipulation" which affiant had never authorized nor consented to or understood in legal effect. That thereby affiant was compelled to be a witness against himself in violation of his rights under the Constitution.

Wherefore, affiant prays that said judgment be set aside

and that he be allowed to withdraw his plea, and that said [fol. 2469] action be dismissed.

Charles H. Hope.

Subscribed and sworn to before me, this 28th day of June, 1939. Clinton R. Duffy, apvd., Notary Public in and for the County of Marin, State of California. (Seal.) My commission expires Sept. 3, 1942.

CRD.

[fol. 2470] No. Criminal 64218

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND
FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

MAJOR RAYMOND LISENBA (also known as Robert James),
and Charles H. Hope, Defendants.

Filed Jun. 30, 1939—L. E. Lampton, County Clerk. By E. V.
Schwartz, Deputy

Second affidavit of Charles H. Hope as to further specific instances of knowing inducement and use of false testimony by District Attorneys and his Deputies and Investigators, and Facts of Conspiracy to obstruct and pervert the administration of justice on part of said District Attorney, his deputies, et al.

Filed in support of Charles Hope's Motion to Withdraw
Plea of "guilty" and to Set Aside Judgment

To the Clerk of the above-entitled Court:

You are hereby instructed to file the within affidavit in the aboveentitled case on behalf of the defendant Charles H. Hope and to bring the fact of the filing of same forthwith to the notice (personally) of the presiding Judge of the Criminal Master Calendar Dept. for appropriate action. Due service by mail made upon Plaintiff. Dated, this 28 day of June, 1939.

Charles H. Hope (Charles H. Hope), Box, 59,885,
San Quentin, California, defendant, in propria
persona.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND
FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

MAJOR RAYMOND LISENBA (also known as Robert James),
and Charles H. Hope, Defendants.

Affidavit and Motion of Charles H. Hope to withdraw plea
of "Guilty", and for an order of Court setting aside
Judgment, and an order granting a new trial.

STATE OF CALIFORNIA,
County of Marin, ss.

CHARLES H. HOPE, being first duly sworn, deposes and
says:

1. I am the defendant, Charles H. Hope, named in the
above-entitled action, now imprisoned in the State Prison
at San Quentin, under a judgment of the above-entitled
Superior Court finding me guilty, upon my plea of "guilty",
in the above-entitled matter; that I was not, and am not
guilty of the crime of murder or any other crime, and that
said judgment against me is void, because of fraud prac-
ticed upon me by the prosecuting officials of the State of
California in inducing me to enter a plea of "guilty",
[fol. 2472] under a misapprehension of facts by which my
legal right to defend was taken from me by a specie of
fraud, all as hereinafter set forth. That I make this affi-
davit, to lay the foundation for a motion in said court to set
aside said judgment and to permit me to withdraw said plea
of "guilty", and to enter my plea of "Not Guilty" and to
defend said charge on the merits.

2. Affiant avers that he has read and studied the opinions
of the Supreme Court of California, in *People v. Lisenba*,
the above-named joint defendant, 97 Cal. Dec. 378, and is
convinced from a reading thereof, especially of the dissent-
ing opinions in said case upon which a rehearing has been
granted as affiant is informed, that much of the same ap-
plies to the facts of his situation and that he is not bound
in law by the confessions, statements and testimony forced

from him under the circumstances hereinafter related and that it is his privilege and right, in the interest of justice, to repudiate and retract same, and that your affiant does now wholly repudiate and retract any and all statements, alleged confessions, and testimony given by him upon the trial or any other place in connection with the above-entitled matter and proceedings, as not having been free and voluntary, and as having been induced by the fraud, duress, fear, coercion and threats, and false promises of the District Attorney, his deputies and investigators of which affiant will offer testimony in open court upon the hearing of this Motion.

3. Affiant avers that from the very inception of said pro-[fol. 2473] ceedings, from the time of his arrest on continuously throughout the trial and until very recently, he has been and was subjected by the investigators and deputies of the district attorney's office of Los Angeles County, acting for said Plaintiff State, as officials of such, to a constant pressure of fear and threats, and that he was induced by said fear and threats and by false promises to make the statements and to give the testimony against himself and co-defendant which he did give; that from the very moment of his arrest, your affiant protested his innocence and stated that he was not conscious of having committed any crime or having done anything wrong, but that for nearly eighteen (18) days after his arrest and before an attorney was secured or allowed to consult with him, he was held in the private custody of the officers and investigators of the said plaintiff, incommunicado, that he requested *and* attorney and was refused the right to an attorney and was not allowed to see one; that during that time he was subjected to a constant grilling and drilling in the story which said deputies of the State wanted him to tell; that all of said testimony so given on the trial was by them carefully rehearsed by them to him and he was induced by threats and false promises so to testify. That your affiant is now informed that under the decision in *Peo. v. Lisenba*, 97 Cal. Dec. 378, the refusal to allow him counsel at that state of the proceedings, when the guilt or innocence was being decided, in the most important preliminary steps, so illegally conducted by the prosecuting [fol. 2474] officials as aforesaid, such refusal of counsel violated his rights under the Statutes and Constitutions

and render such statements, admissions and testimony incompetent and inadmissible against him. That it is his desire to and he does hereby repudiate and retract same "in toto,"²⁶ that is to say, in whole and not in part.

4. Affiant avers that during said eighteen days, after his arrest, when such statements were being extorted and such agreement to testify being forced upon him, he was taken to the office of the District Attorney, who threatened him in these words:

"If you don't co-operate with us, tell the truth as it is, *I will frame you if I have to.*"

That said District Attorney (Mr. Buron Fitts) then and there shook his fist in my face and told me if I did not co-operate he would get me if he had to frame me. That your affiant believed said threats and was greatly put in fear thereby, to such an extent, your affiant avers, that his free will and agency were completely destroyed, and he thereafter did as he was bid to do by said prosecuting officials, that is to say, did enter the said plea of guilty, although he was not in fact guilty, and did testify as he was told to by said prosecuting officials, the same being the testimony given by him on the trial.

5. That at said time and place, said district attorney further threatened your affiant, "I'll try you with him and I'll hand you with him if you don't do as you're told." [fol. 2475] The above in his office during the investigation. When I asked to see a lawyer, they refused, and said they would get the public defender to represent him, as they said they could "co-operate." That this constituted the use of force or offer of force and violence against me. Mr. Robert Stewart, then a deputy district attorney, then present at one such meeting, told Mr. Fitts in my presence, "You would rather have this case at this time before election than anything on earth. *Stop threatening the man and listen to him.*"

6. Affiant further avers that he was induced to enter said plea of guilty by the above mentioned threats and fear, and by the false promises and false representations on the part of the district attorney made to affiant that if he would enter said plea of "guilty", it would be a mere matter of form, and that after the James trial was out of the way,

they would then extend him leniency and recommend same and that they would allow the court to hear and decide from affiant's evidence that affiant had not been guilty of any crime, or if he had become involved in some unknown manner in not fully or properly reporting his knowledge, that he would be found guilty of said misdemeanor only, and that he would be given full opportunity to defend and present any and all evidence; that affiant did not understand that he was entering a plea of Guilty to Murder in any degree or to homicide in any degree; that your affiant was not and is not guilty of murder or manslaughter, either as a principal or accessory before or after the fact, and that [fol. 2476] whatever he did he did in good faith and without criminal intent and without knowledge of wrong doing if there was any, which is the substance of his repeated statements to the district attorney and upon the basis of which it was agreed between the parties that the court should enter its decision; that it was never in contemplation of affiant's mind that he would plead guilty to murder or be found guilty thereof. That said promises and agreements were believed and relied upon by affiant; that they were false, were known to be false by the district attorney and his agents and were knowingly made with the intent to deceive and mislead this affiant and to induce him to enter said plea of guilty, and that the same did have that effect. That upon the conclusion of James trial, your affiant was given no opportunity to defend such as he had anticipated and as he had been promised; the foregoing promises were broken and your affiant was summarily found guilty of murder in the first degree and thereafter sentenced for same. That the foregoing facts and other facts which affiant will adduce in support hereof constitute fraud on the part of the prosecuting officials and render said plea and judgment void.

7. That the illegality of the proceedings, the violation of the numerous criminal statutes and clauses of the Constitution for protection of citizens placed as defendants on trial, and knowingly and wilfully compelling both defendants to give false testimony against themselves has been pointed out by the Supreme Court of this State in the decisions in the case above mentioned *Peo. vs. Lisenba*, and [fol. 2477] that the same apply to your affiant, and your affiant makes all of same a part hereof by express reference

in this behalf, as showing a scheme and general plan of action on the part of the prosecuting officials themselves, which render the same admissible, under the same theory which they used to introduce incompetent and inadmissible evidence of previous alleged "crimes" of like nature against co-defendant of your affiant.

8. That ever since the consummation of said fraud as aforesaid, your affiant has been as "the voice of one crying in the wilderness", that he was unjustly and fraudulently convicted of a crime which he did not commit, if any crime was committed by any one; and in this behalf, affiant avers that he was acting under stress of hysteria and excitement, threats and fear at the time of the trial, but that subsequent reflection has lead him to the believe that his co-defendant James was in such a condition of mind as to be temporarily incompetent whether from alcohol or otherwise, and his evidence hence of no value, (Mythomania) at the time James found the dead body of his wife, following a long series of attempts on her own part to commit the crime and wrong of abortion or infanticide (murder of baby) and as a direct result of the effect of the drastic medicines and methods resorted to by her to that end which unfortunate misdirection of mind on her part has caused suspicion to point to those who were in contact with her; that your affiant does not believe that defendant James was capable of understanding what he was saying or doing, [fol. 2478] due to intoxication and mental condition then present, and his statements were of no evidentiary value and were not believed by me; that your affiant has no personal knowledge as to whether or not a crime was committed by any one except the decedent, who, according to testimony, was engaged in attempted abortion of herself, a very dangerous thing, especially if followed by a bath and severe hemorrhages followed by sudden heart failure; whether or not she drowned herself — was drowned accidentally, affiant does not of his own knowledge know and upon a new trial he will contest the right of the state to introduce any statements or testimony of alleged confessions or testimony on the previous trial, and will put the State to their proof, believing that they have no evidence and can produce none sufficient to justify this case being given to a jury. That the course of action described in Dissenting Opinion of the Supreme Court, as to the building-up of a

case by over-zealous and ambitious officials, who had created a certain theory in their own imagination, and then sought to compel affiant and others to give false testimony to fit that vision, affiant avers to be true in fact.

Specific Accusation and Complaint Against State Prosecuting Officials (District Attorney and Men) for "Willful or Corrupt Misconduct in Office" Under Sections 658 and Section 771, inclusive, of the Penal Code of California

[fol. 2479] 8-A. Affiant Charles H. Hope further specifically avers that in the "statement" filed by the district attorney on file in this case it is said: "Hope, (affiant herein), was an accomplice of Major Raymond Lisenba, in an effort to kill Lisenba's wife by rattlesnake poison, *although this method of killing the wife failed*, Lisenba completed the job by drowning her in a bath tub." affiant avers that the decisions of the courts hold, and it is the law, that where an alleged attempt to murder fails, and where death ensues not from such attempt but from supervening or subsequent causes, or a separate and independent assault with which the accused had no connection and no participation, or knowledge or intent and no pre-conceived design, it is a good defense entitling him to an acquittal. That before the jury and court were justified in finding affiant guilty of murder in the first degree, as the court did find this affiant so guilty upon his plea of guilty to whatever crime the evidence might show and not his plea of guilty to murder as has been falsely shown by the record, due to a mistake of fact, it was incumbent upon the state to prove beyond a reasonable doubt that the alleged attempt against life by rattlesnakes caused the death, and that said rattlesnakes were not merely on the premises, but that they actually struck and bit the deceased infecting her with fatal poison, proven beyond a reasonable doubt as a cause of death. If doubt existed, affiant was entitled to an acquittal. Affiant accordingly avers that the procurement of false testimony by the state, knowingly and willfully that the rattlesnakes [fol. 2480] had bit the deceased, when as a matter of fact affiant refused to so testify and said that that story was all "bunk" or untrue, was very material matter, which the state prosecution officials know and knew to be false, under secs. 127, 128 Penal Code.

S-B. Affiant avers that this issue, this theory of the prosecution of death by rattlesnakes was and is a false one, and was known to the state prosecuting officials to be false; that for many days prior to the James trial, affiant was subjected to a constant gruelling by the district attorney and his staff of investigators, in which he was solicited, procured and requested to falsely testify against his will and for and on behalf of the State to the rattlesnake fiction or story known of "Macbeth hellish brew of the dancing witches" fame, Vol. 97 Cal. Dec. at p. 463, *Peo. v. Lisenba*, this case due to such characterization by the classic or classical opinions of the Supreme Court of California, a part of the law of this case, of which this court must take judicial notice and knowledge; affiant avers that prior to taking the stand he at all times told the said state prosecuting officials (with exception of Eugene Williams) C. H. among them Messrs. Buron Fitts, Bob Stewart, Scott Littleton, Jack Southard, and others mentioned in the transcript of the trial as being present, to which reference is hereby made for further particulars, that to his knowledge no rattlesnake ever bit or poisoned James' wife; all notwithstanding their knowledge of the falsity of said, said state prosecuting officials did coerce and compel this affiant, by threats of framing him and hanging him, and by intimidation as well as by false promises of immunity and release, too numerous to mention, to testify falsely that the rattlesnakes of the district attorney's creation had in fact struck at, bit and poisoned the James wife, in the presence and seeing of affiant; affiant will restate this elsewhere in his affidavits, to supply other elements to make it clearer.

Affiant here appears in the first person:

I was held incommunicado in Glendale, brought from there to Grand Jury room (had never seen a lawyer) and told by Jack Southard that I would be told in the "room" that I had rights but that I had better disregard that and tell the story that they had given me and that had been gone over by them with me hundreds of times. (See p. 421, of *Peo. v. Lisenba*, 97 Cal. Dec. 421); also to say that I had not discussed what he proposed to testify to with any one, also to say that I had not been promised anything, the state prosecuting officials well knowing all this to be false and untrue.

Affiant further avers in the first person:

"During James trial as I was preparing to take the stand, Southard told me it was *absolutely necessary* to say I saw the snake bite the woman, I refused. He said I would at least have to say the snake struck at the woman. He explaining that I should say this and not that I did not know. He further stated to me "You'd better: You're not out of this yourself yet'."

[fol. 2482] "The further fraud of the District Attorney in not allowing my day in court and said decree after my plea without defense promised and until after I had testified and holding a death threat over me if I did not.

I hope this makes it more clear. However, the thing is simply this as far as I'm concerned,—all these doctrines were conceived in error, founded on fallacy, propagated by falsehood, and error, in short, puerile, idiotic and utterly asinine.

(Copies from Memorandum to Scribe in my own hand writing May 11, 1939.)

Affiant will ask leave of court for a continuance for time within which to prepare and file his evidence as to the false promises operating upon the entry of plea of guilty and upon the procuring of the false testimony on the trial, as his present time and station, without private counsel, necessitates. Suffice it to say that this pretense of friendship for affiant and his wife extended throughout the Conversations and contacts and proceedings both before and upon and after the trial and up until a very recent date, and said promises and agreements were tantamount to assuring this affiant that he would be found guilty of a minor misdemeanor, or after the surprise conviction resulted, the story was adapted to the situation to include an immediate commutation of sentence or pardon as soon as the case should be settled in the Supreme Court and James [fol. 2483] hanged. They promised but failed, to take stand

C. H. Hope

in my defense. ~~Promises extended to assistance to the~~

C. H. Hope

~~family of your affiant, and lucrative employment.~~ That none of said promises were ever kept; that they were wholly false, made in bad faith, and were elements of deception and fraud entering into the trial and proceedings above

mentioned. A "bill of particulars" will be furnished any one on request.

1. That, at and within the County of Los Angeles, State of California, on or about, June 22, 1936, said persons and each in persuance of their pre-conceived plan, and acting in common concert did plan to procure convictions by inducing and using false testimony or threaten and abuse this affiant that if he did not testify that rattlesnakes were used to cause death that they would frame affiant and hang him; that he was subjected to the same kind of insistent questioning for hours and treatment such as was administered to James, and that the same finally broke down his will and despite his original insistence to the contrary, he was compelled by threats and in mortal fear of his life, as well as induced by the false promises of immunity referred to in other parts of this affidavit, to testify to the rattlesnake story on the trial; that the same was substantially false and known to the district attorney and his said men to be false.

2. Affiant further avers that, since his imprisonment he has obtained what purports to be a copy of the reporter's transcript of July 24, 1936, when he was found guilty or [fol. 2484] sentenced that he has remained in ignorance of the legal significance of this statement:

"There Already Has Been a Stipulation That the Court Might Take Into Consideration the Evidence Given in the Trial of Major Raymond Lisenba, Also Known as Robert James, Under Indictment With This Defendant, for the Purpose of Fixing and Determining This Matter."

Affiant avers that this is stark fraud, in that he never at any time ever stipulated or agreed thereto; that at the time of that hearing in court, your affiant did not even know what the word "stipulation" meant, and that he did not understand that by that means the district attorney was having him agree that the testimony of his co-defendant, and all other testimony given in James trial, would be used against him for the purpose of determining what crime, if any, he had committed; but on the contrary affiant avers that he at that time believed and was led by the statements of the district attorney and his own counsel to believe, that only affiant's own testimony would be considered; that affiant had expected to be given opportunity to introduce fur-

ther testimony corroborative of his own testimony of innocence and lack of knowledge of crime, but that no adequate opportunity so to do was given. That your affiant was as ignorant of that legal effect of said "stipulation", as he believes that the Supreme Court points out that his co-defendant was of the like trick of the District Attorney in asking James if he had anything to "add" to affiant's state-[fol. 2485] ment; the effect in both cases being to bind them with statements and testimony, without their knowing or intending it. That your affiant never at any time authorized his counsel or any other person to make such stipulation or any stipulation of like nature; that your affiant was likewise ignorant of the legal effect of the further stipulation in the record that he was present during the taking of such testimony of James, so used against him without his knowledge; that he was ignorant of the law that he was required to deny the truth of said testimony or be bound thereby. That therein and thereby your affiant's Constitutional right to the assistance of counsel was violated, and he was and is deprived of his liberty without due process of law, which is here set up and assigned as a violation of his rights under Sec. 13, Article I of the California Constitution, and the Fourteenth Amendment to the United States Constitution. That said facts are also detailed as facts of fraud.

3. Affiant wishes the court to see that counsel are in attendance, that a continuance of 30 days or reasonable time be allowed to prepare and file further evidence, and prepare for trial, and that an order for his attendance as a witness be made; affiant further desires that the court make its order prohibiting any member of the district attorney's staff or an officer of California interested in prosecution from contact, intimidating or molesting affiant or subjecting him to any undue restraint or in any manner to unduly influence his free and voluntary pursuit of this proceeding; [fol. 2486] that counsel not associated with either district attorney or previous public defender's office, be appointed; that the present district attorney and staff be disbarred and suspended from prosecuting this action, and that the court appoint the Attorney General to supercede him.

Anticipating the usual denial of omission of public duty, affiant also quotes from Shakespeare, Author of Macbeth, a classic drawn from by the Supreme Court as to the hellish brew of the witches in that like fantastic creature of the

imagination, here paralleled by the State prosecution, and predicts that their answer in substance will be: as that of the debtor banished for treason: in "As you Like It".

"Never as much as in a thought unborn did I offend your Highness; (answered). Thus do all traitors: for every purgation did consist in words, They are as innocent as grace itself."

Wherefore, your affiant prays that said judgment be set aside; that he be allowed to withdraw said plea of guilty, and enter his plea of not guilty; that he may have the further and additional incidental relief all as fully indicated as desired in paragraph eleven (11), above; and that he may have such other and further order or judgment as may to the court seem fit and proper.

Charles H. Hope.

Subscribed and sworn to before me this 22nd day of
[fol. 2487] June, 1939 —C. H. Clinton R. Duffy,
Notary Public in and for the County of Marin,
State of California. My commission expires Sep.
3, 1942.

[fol. 2488]

Copy

EXHIBIT A

California State Prison,
San Quentin, California,
May 19, 1937.

Hon. Charles W. Fricke, Judge Superior Court, Los Angeles, California.

YOUR HONOR:

If I am in error in addressing your honor, please be kind enough to excuse me and my ignorance of the proper procedure.

I was identified with the James case, tried in your court, sentenced to life imprisonment. I wish to make a few statements, and ask a few questions—of a confidential nature—if it please your honor.

Is it correct that the trial judge has no jurisdiction over cases after one year? If I were to prove to you, beyond doubt, that I did not conspire, and that I was in ignorance of

what was going on, would you recall me to review some vital evidence, smothered, when I appeared before you for sentence?

This takes me back a year, when, in a conversation with the late Deputy District Attorney, Mr. Bob Stewart and investigator Jack Southard, I mentioned, throughout, I was not guilty of murder, or that I had no knowledge of a murder being planned. So, they put it up to me in this way.

"Did I think I had done something wrong?" I answered [fol. 2489] yes, but I didn't know to what I would be willing to plead guilty. My thought was to lay the facts before the court, and let the court decide; this with the understanding that I should have the opportunity of explaining my side of the case.

A few days later Mr. Southard came to me and said: "Everything is taken care of, and you are to have your day in court, at the end of the trial." I was not very enthusiastic about the arrangement, until later, Mr. Cuff came and reassured me on the same premises. I asked him point blank if a judge could free me, or fix sentence on any charge the evidence might warrant. He told me—"Yes". He did say, however, that I would do some time, regardless of any evidence, although to this day he does not know what I was prepared to present; namely, I think, because he went into it only far enough to satisfy himself, that I had killed no one,

Well, they talked me into the plea of "guilty" and we came into your Honor's Court. Among other things said, I remember because I was particularly listening for it, was your Honor's remark, that the degree of crime and time of punishment would not be set until after the evidence was presented. This was what was promised me, what I considered fair, naturally assuming this meant all the evidence; proof that would throw an entirely different light on the case, as it affected me, as well as bring some startling facts to light.

[fol. 2490] My day in court arrived, and Mr. Cuff stated that they were ready to present our case. The court replied, "that it would do no good, His mind was already made up—it was first degree murder." I was dumfounded, and arose to object when Mr. Cuff failed to do so, but he merely pushed me back and said: "Keep still!" Later he put me on the stand and asked a few unimportant questions, to which I made answer, thinking all the while * * * "I am

found guilty of murder, when I know I am innocent and can prove it." But how? The chance I had been promised in order to get me to plead guilty so I could testify never came.

I cannot bring myself to believe your Honor was aware of this and various other things, I was led to believe you knew, and still not give me the opportunity to tell my side of the story. Neither do I like to believe, it was a deliberate breach of faith on any one's part, rather, the mass of secret information appeared negligible to my advisors.

For example;—an insignificant one if you choose—Can the District Attorney give a complete and coherent solution as to how Mr. James came to be watched for these many months, and finally arrested on incest? I have read some six or seven versions of it. None agree. I can tell you in three words *was* caused it and why it was done. Does a person guilty of crime go this far to be caught?

I have heard many times, that, though severe, your Honor is fair and just. I believe this to be a fact—therefore this [fol. 2491] letter. Give me a chance to remove some of the shame and disgrace that has been heaped upon those I love; the stigma I have borne, unjustly. My burning desire to appear before you and tell my complete story is born after months of meditation and *same* deliberation, without malice toward anyone, only that justice may prevail.

It has been over a year since my arrest. My record at Folsom and since I have been transferred here is clear. I do my work to the best of my ability and mind my own business.

May I please expect a reply from you at an early date.

Yours respectfully, Charles H. Hope, Box # 59885,
San Quentin, Calif.

[fol. 2492]

Copy

EXHIBIT B

THE SUPERIOR COURT, LOS ANGELES, CALIFORNIA

Charles W. Fricke, Judge, June 10th, 1937

Mr. Charles Hope, Box 59865, San Quentin, California.

DEAR SIR:

I received your letter, but your problem is one in which I cannot act to represent you, as I was the Judge in the

case, and your personal problems will have to be handled through an attorney.

Yours truly, Charles W. Fricke.

CDF:MTD.

[fol. 2493] If it be further said that these affidavits are not admissible on Petition for Rehearing, we respectfully submit that we are also filing with this Honorable Court a Petition for a Writ of Habeas Corpus, under authority of *Mooney v. Holohan*, 294 U. S. 103, and respectfully request that these affidavits be considered upon the Petition of said Writ and as a part thereof, in order that a corrective judicial process to remedy the wrong, if constitutional rights are not to be impaired, may be invoked to set aside a conviction, based upon perjured testimony later discovered, but not too late, and still within the power and jurisdiction of this Honorable Court to remedy.

We however respectfully call the attention of this Honorable Court to the language of Article VI, Section 4 $\frac{3}{4}$ of the Constitution of California, which authorizes the taking of evidence by Courts of Appellate Jurisdiction under circumstances therein set forth, and concludes:

"The Legislature may also grant to any Court of appellate jurisdiction the power, in its discretion, for the purpose of making such findings or for any other purpose in the interest of justice, to take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and to give or direct the entry of any judgment or order and to make such further or other order as the [fol. 2494] case may require. (New Section adopted November 2, 1926.)

Pursuant thereto, Section 956 A of the Civil Code was adopted and such section gives Appellate Courts the authority to take additional evidence at any time prior to the decision of the appeal 'for any other purpose in the interests of justice.'

Rule XXXVIII provides the authority for this court, upon application to this court for leave to produce such additional evidence.

We herewith submit a certified copy of the affidavits made by Hope in the Superior Court, and ask leave of this court

to present such testimony and prove the facts set forth in this Honorable Court.

[fol. 2495]

V

That Alleged Evidence of Another Purported Offense in Another State was Presented in the Trial of this Case, without any Indictment, Information or Judgment thereon and without Any Jurisdiction of the California Court of the Subject Matter Therein, and that Said Use of Said Testimony Placed the Defendant upon Trial in California before a California Jury on Such Purported Offense, and is in Violation of Due Process of Law, Guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The people of the State of California, with their processes and finances brought several witnesses from the State of Colorado and extensively introduced evidence regarding the death of Winona James, a former wife, whom they alleged that he murdered in 1932. No accusation was furnished the accused; no notice was given, and no opportunity was occasioned to be heard in reply, because the processes of the State of California do not extend to Colorado. Nor was the defendant given any continuance or opportunity to get counter testimony which it appears was available, were the opportunity accorded to appellant.

Notice of a charge one has to meet, and an opportunity to meet it, are elemental principles of due process of law, guaranteed by the Fourteenth Amendment to the Constitution of the United States, and a denial of them to the accused was a denial of rights guaranteed by the Federal [fol. 2496] Constitution. Nor were the processes of the California Courts available.

As pointed out in the dissenting opinion of Mr. Justice Seawell in *People v. Lisenba*:

"The admissibility and sufficiency of the evidence admitted to prove that the death of Winona, which occurred in the state of Colorado in 1932, was accomplished by the felonious and premeditated act of the defendant, waiving the reasonable doubt doctrine, depends upon the further question as to whether it satisfied the rule which provides that such evidence cannot be admitted if in character it is so vague, uncertain or unsubstantial as merely to create a suspicion of guilt. Defendant further objected to an offer

of proof of the other alleged crime claimed to have been committed in another jurisdiction distant more than a thousand miles from the place of trial and invoked the common law and statutory rights which vouchsafe the right of an accused to be tried in the county in which the crime was committed. The ancient right cannot be denied in a case where punishment is to be imposed for the specific offense charge in the indictment or information. The right does not exist where the evidence of another crime is limited in its probative scope and effect to the purposes heretofore defined. The appellant complains that great distance from [fol. 2497] the situs of the offense deprives the accused in many cases of the means of discovering evidence material to his defense and, in effect, amounts to a denial of the process of the court to compel the attendance of witnesses in his behalf. Cal. Const., art. 1, § 13. The point urged is illustrated by a matter which arose at the trial of the instant case. J. D. Rogers, the superintendent of Pike's Peak Auto Highway, a private enterprise, was brought from Colorado as a witness on behalf of the state. He testified that, upon his arrival at the scene where Winona James was injured and in attempting to ascertain whether she was breathing, he placed his head near her mouth and detected a strong odor of liquor on her breath. This evidence furnished support to the prosecution's argument to the jury that James had made her drunk before the automobile crash. This evidence would not have ordinarily been anticipated by the defendant in advance of trial, a contingency which frequently arises in the trial of cases. The appellant brought to the court's attention the fact that a letter had been recently delivered to him at the county jail, written by a party or parties in Colorado, outside the jurisdiction, who met and talked with Mr. and Mrs. James at the top of Pike's [fol. 2498] Peak a short time before they started down the mountain stating they could and would testify that there was no evidence or indication that either Mrs. James or James was affected by liquor. It appears from the discussion between court and counsel that the named party volunteering the information by letter and counsel for defense were acting in good faith in the matter, and counsel, in asking the process of the court to produce the evidence by deposition or otherwise, was not derelict in disclosing the information. A continuance was moved that the deposition of said person might be taken to show that Mrs. James was

sober and in a normal condition a short time before she received said injuries. No formal motion having been made by way of affidavit, the court denied the motion for a continuance for the purpose stated. The motion was renewed when the assistant district attorney in his argument severely arraigned the defendant for preparing his wife for death through the means of intoxicating liquor. It is so obvious as not to require more than a mention of the proposition that, in circumstances where the means of communication or opportunity for investigation and preparation for a defense and all the other recognized advantages which local contacts afford, are made difficult or inaccessible [fol. 2499] to the person placed on trial for a crime committed far distant from the place of the trial, every opportunity should be liberally extended to enable such person to meet any surprise evidence or unforeseeable situation arising at the trial, even at the cost of a continuance. The importance of the testimony of the two Colorado persons who offered to testify in rebuttal of the Rogers' evidence as to the sobriety of Mrs. James is given added emphasis by the prominence this court has given to the issue in its opinion herein as well as that given to said issue by the prosecution in argument to the jury."

[fol. 2500] That the use of this testimony was a denial of due process is shown by the fact that much of the argument of the prosecutor is taken up with this other unalleged case and much of the testimony and opinion are devoted to it.

It was a denial of due process to have sat in the courtroom through the weary days of the prolonged trial; to have listened day after day to the testimony of witnesses brought from a distance of 1500 miles at the expense of the State for the purpose of giving testimony which, whether true or false, was not within the power of the defendant to rebut; to have listened while such witnesses, presumably honest and truthful; but to one experienced in such matters, clearly biased in favor of the side that produced them; to have listened day after weary day to the gruesome description of injuries suffered by a woman to whom death must have come as a merciful release; to have heard the circumstances of that most unfortunate accident, not merely related in harrowing detail, but obviously distorted by memories weakened by the lapse of years and distorted to the injury of this appellant; to have seen those

circumstances presented in a false perspective and "trifles light as air" gravely presented as "confirmation strong as proof of holy writ"; the evidence as to the injuries sustained by his former wife consists of circumstances, most of which have been reasonably explained. The most significant circumstances are that if he had inflicted her [fol. 2501] injuries in an attempt to kill her, every motive of self interest would have prompted him to complete the crime instead of going several miles to secure aid for the injured woman. The theory of the prosecution was that he first struck her in the back of ~~the~~ head with a blood-stained hammer. This theory is utterly dispelled by the fact that bits of granite were found imbedded in this wound and that the blood stains upon the hammer attest an innocent accident is shown by the presence of the hammer at the scene of the injury. The defendant would have thrown it amongst the rocks and boulders which the photographs show scattered over the hillside. Finally, he and his wife continued living together harmoniously after she regained consciousness and although she was in the hospital for several days and talked with many people, there was never the hint of an accusation against her husband.

That the evidence of these wounds and the sight of the rattlesnakes in the courtroom were controlling influences in bringing about the verdict does not admit of a question. Appellant was tried more largely for the murder of Winona James in Colorado than for the murder of Mary James in California. The Court cannot read the closing argument of the prosecution without perceiving how very prejudicial to the appellant the production of this evidence was. Yet Winona James did not meet her death as the result of these injuries. She was drowned in the bath tub of the [fol. 2502] James residence. She was found dead there when James, who had been in Colorado Springs on business, returned. The distance from Colorado Springs to Manitou Springs, where James and his wife were then living, is six miles. The distance from the store to the James residence was approximately one mile. James was seen in Colorado Springs about 4:00 o'clock in the afternoon and the delivery boy from the grocery store was with him at 5:00 o'clock when the body was discovered. For James to have walked between the two places in the time is an impossibility. For him to have traveled by stage

between the two, to have gone to his residence, committed the murder, returned to the store, if not an utter impossibility, scarcely lay within the possibility of human accomplishment.

We are transcending the limits we had set for this branch of our argument. We have in mind the long line of cases of which *In Re Cohen*, 6 Cal. 318 is an example. We refrain from citing any of the long list of cases in which this court had held that slight error is sufficient in such unsatisfactory state of the record to necessitate a reversal, [fol. 2503] except the single one of *People v. Tapia*, 131 Cal. 647, but we do say that we are unable to reconcile the decision in this case with those that have stood unquestioned almost from the organization of this court down to the present time.

In *Powell v. Alabama*, 287 U. S. 45; 84 A. L. R. 527, the court quotes with approval *Com. v. O'Keefe*, 298 Pa. 169, 173, 148 Atl. 73, as follows:

"It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts of the case."

We respectfully submit, therefore, that the use of this testimony was a denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

With respect to the decision rendered in rehearing, the court has criticised counsel for the defendant for not having raised a question as to the soundness of a certain instruction until after petition for rehearing was granted. It was our understanding that the granting of such petition reopened the entire case. It is true that we ought to have [fol. 2504] discovered the error in this instruction sooner than we did. We ourselves were the first to voice the criticism of the fact. That we did not discharge our duty *as* we should have done, does not in any way militate against the gravity of the error.

The court has said that we complain only of the opening sentence. If the court will read our briefs more carefully the court will find that we have complained of the entire instruction as a vicious argument against the defendant, the throwing of the weight of judicial influence against him, and have referred to the case of *People v. Maughs*, 149

Cal. 253 as being the case in which the judicial influence was exerted more fully. But we protest that the court itself has fallen into error when it says that because correct instructions were given elsewhere, the man could not be injured by the erroneous instruction to which we refer. As we read the latest expression of the court, the instruction which we attack is erroneous. If it be erroneous and the jury followed it, then this defendant's life has been taken as the result of the error. If correct instructions were given elsewhere, how can this court tell which the jury believed. It could not follow inconsistent instructions. Heretofore the rule has been uniform that while the instructions must be taken as a whole and if so taken can be construed together so that what is omitted in one is supplied elsewhere, the instructions will be consistent. It has never been held by this court before that where one part [fol. 2505] of the instructions is absolutely inconsistent with another that the incorrect instruction may be disregarded. We view with apprehension the future liberties of innocent men accused of crime in a State where such a rule can prevail. May we, without disrespect to the court, urge once more that expression of the court to which we refer is opposed to an unbroken line of its decisions to the contrary. No useful purpose would be served in repeating those cases now. They are cited in the supplemental brief and our examination has revealed the rule to be one of universal application.

[fol. 2506]

VI

That Major Raymond Lisenba was unlawfully imprisoned and isolated in a private building for three nights and days, before being lodged in any jail; that he was then held practically incommunicado for eleven days, and almost incessantly questioned by officers until the alleged confession was given, and that the use thereof in evidence at the trial was in violation of due process of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

What took place during the period while Lisenba was being secretly held by the officer, the unceasing questioning, the beatings and brutality, the wearing down of the victim's physical strength and morale are matters which are presented elsewhere; also similar subjects as to the

treatment administered to Lisenba after being lodged in jail are argued under appropriate assignments.

Here, the contention is presented that the procedure followed was not only a violation of the law in such case made and provided, but constitutes a violation of both the State and Federal Constitutions which guarantee due process.

In *People v. Dye*, 119 Cal. App. 262, it was declared: "The right of the accused in a given case to a fair trial, conducted substantially according to law, is *at the same time the right of all inhabitants of the country to protection against procedure* which might at some time illegally deprive them of [fol. 2507] life or liberty."

The opinion quotes *People v. O'Bryan*, 165 Cal. 55 as follows: "It is an essential part of justice that the question of guilt or innocence shall be determined, *by an orderly legal procedure*, in which the substantial rights belonging to defendants shall be respected," citing *People v. Wilson*, 23 Cal. App. 513.

Justice Seawell, in his dissenting opinion, recognizes that Article 1, Sec. 19 of the State Constitution was violated by the unlawful procedure here shown to have been followed, but, we believe, mistakenly admits that no applicable remedy exists of which the appellant herein could avail himself.

Surely, since the sole object of the prosecutor and his officers in having violated the law and denied the accused his constitutional rights was to force from him a pseudo confession to be used as the chief instrumentality to later, on trial, deprive him of his life, the remedy for this palpable wrong lies in barring the pretended confession.

True the law denounces the admitted acts of the officers as criminal and provides fines and imprisonment as penalties. True, the fact that although such criminal acts were openly admitted and no action has been taken to punish the flagrant offenses, still the fact that offenders might be punished would be no remedy for appellant's wrong.

[fol. 2508] But substantial remedies do exist. If it be conceded that because of the fact that the substantial rights of the defendant were not respected, and the orderly legal procedure was not followed, and that the procedure which was followed prior to the trial was not "substantially according to law" it results that the conviction of the accused was violative of the due process clauses of our Federal Con-

stitution, and Article I, Section 19 of our State Constitution.

If such violation is shown the conviction cannot be upheld. The judgment must be reversed, because it becomes void under the due process clause of our Federal Constitution, Fourteenth Amendment. A new trial is the right of the appellant, at which the fruits of the illegal procedure must be barred and in which the minds of the jurors will not be poisoned and inflamed by an alleged confession obtained through the barbarous defiance of the rights of persons accused of crime as recognized in all civilized countries.

Without the necessity of reliance upon the common law and the decisions of courts of other jurisdictions from time immemorial we need only point to the laws of California, and to the Constitution of the United States, Fourteenth Amendment, to show the undisputed violations of appellant's rights herein.

Justice Seawell said, reference being to officer Southard: [fol. 2509] "His act was inexcusable and was in violation of section 149 of the Penal Code, which provides that every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years."

Southard admitted assaulting Lizenba while questioning him about the charge of murder. Justice Seawell appeared certain sections of the Penal Code to this case in apt judicial language as follows:

"The alleged confession began to break, after days of unremitting effort, at 1:45 in the morning. No one, not even Mr. Silverman, the defendant's attorney, or Mr. Parsons, had knowledge of the place in which the defendant was held in private custody by the investigators. Neither his friends, relatives nor the public knew the place of detention. No warrant of arrest had issued and there was no public record, or any record, which would enable anyone not a member of the staff of investigators to know of or discover the presence of defendant.

The law prescribes the places in which persons charged with crime may be detained. A private house located in a

residential part of a city and not complying with the provisions of law prescribing the purpose and use of county jails and their management, is not a place where persons charged or suspected of crime may be lawfully detained. [fol. 2510] Grave abuses may be practiced against persons thus illegally held in secret confinement. Pen. Code, 1597 et seq. Every police officer who, having arrested any person upon a criminal charge, wilfully delays taking such person — a magistrate for examination is guilty of a misdemeanor. Section 145, Pen. Code. In the instant case the defendant was held in custody seventeen days without the issuance of a warrant and without being taken before a body which had power to examine the offense with which he was finally charged. He requested that his attorneys, first Mr. S. J. Silverman, whom the district attorney had reported out of the city for the week-end, and then Mr. R. E. Parsons be contacted. Neither appearing to be immediately available, the inquisition, in which a number of the investigators took part, was vigorously and unrelentingly pressed, without delay, through many hours. It was not a proceeding authorized by a statute and no sufficient reason was or could be shown why the request of defendant for advice of counsel, a right guaranteed by the Constitution and by statute to every person charged with crime, was not complied with. Section 849 of the Penal Code provides: "When an arrest is made without a warrant by a peace-officer * * * the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and in information, stating the charge against the [fol. 2511] person, must be laid before the magistrate." Section 859, following the procedure above cited, provides that the magistrate must allow the defendant a reasonable time to send for counsel and may postpone the examination for that purpose. Upon *request* of the defendant the magistrate *must* require a peace officer to take a message to any counsel in the township without delay and without fee. These and other provisions of the statute cannot be circumvented by resorting to any methods which tend to deny the rights and protection which the law guarantees to every person charged with a crime. The statutes impose quite substantial fines and terms of imprisonment upon peace officers for the willful disregard of their duties. Pen. Code, 145, 147 and 149."

The facts concerning the procedure followed by the prosecutor and his aides was so flagrantly illegal that it cannot be questioned that this court, as constituted when the decisions were made in *People v. Dye* and *People v. O'Bryan*, both *supra*, would have unhesitatingly held that Art. VI., Section 4½ of the State Constitution had been violated. That the Prosecutor did not pursue "an orderly procedure" is recognized and deplored by the opinion of the court affirming the judgment herein; from what is there recited and said it is clear that the defendant was not protected "against procedure which might at some time illegally deprive them, the citizens, of life and liberty."

This illegal procedure has deprived this petitioner of his liberty; it will deprive him of his life, if this judgment is [fol. 2512] allowed to stand, because through the use of a so-called confession obtained through a course of coercion which would have made the inquisitors of the days of *Magna Charter* and the *Bill of Rights* blush because of its superiority in technique to their methods, a conviction has been obtained and a death sentence has been pronounced.

Under the Fourteenth Amendment to the Federal Constitution it has become the settled law that evidence procured by an unlawful seizure is barred from use against a defendant. (*Olmstead v. U. S.* 277 U. S. 438, 72 L. Ed. 944.)

The basic reasoning of that decision cannot be distinguished from that necessarily resulting through the application of logic where, as here, grossly illegal means are employed to secure an alleged confession from a helpless and tortured citizen accused of murder.

To say that although the fact is admitted that such methods were employed several days before the statement actually given to the jury was made, that statement was freely given because just before it was finally made no one struck the accused or threatened him is begging the question. The evidence showed, as Justice Seawell declared, that the questioning was almost "incessant" even after the defendant was lodged in jail and up to almost the moment that the final statement was made. The evidence was overwhelming, which was recited by the dissenting opinion, although not commented on in the opinion of the [fol. 2513] court herein, that Lisenba was mistreated while in jail. A prosecutor, using the same evidence against an accused, would have ridiculed a defense counsel who would

have denied that such mistreatment had occurred and the incessant questioning was admitted.

If this conviction, barded with a judicial approval of the illegal procedure here employed, is to establish the law in this state, it must become a menace to the liberty and life of every citizen, for any person, no matter how innocent, may sometimes be accused of the grossest crime.

[fol. 2514]

VII

That the Repeated Taking of Defendant Lisenba from Jail without his Attorney and against His Consent and to the Office of the District Attorney and other Places and after Prolonged Questioning without Food and without Rest and thereafter Extorting a Purported Confession which was used in the Case against Appellant was in Violation of Due Process of Law Guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Due process of law requires that a defendant be represented by counsel at all stages of his case and that it be counsel of his own choice. *Powell v. Alabama*, 287 U. S. 45, 77 L. ed. 158; 84 S. L. R. 527; *Jones v. Commonwealth of Kentucky*, 97 F. (2) 335. The appellant after finally being lodged in jail, on a charge of murder without bail, could not be removed therefrom without an appropriate order of court without the officers thus taking him being guilty of an "escape" under Section 1600 of the Penal Code.

He was entitled to remain in jail unmolested and he was entitled to be represented by counsel. He did have an attorney, Mr. Silverman, who conferred with him. Without the knowledge or consent of the attorney representing him he was forcibly taken out of the jail to the district attorney's office and there he was questioned from early morning until the next morning. He was denied the right of counsel, a right guaranteed under the Fourteenth Amendment [fol. 2515] ment, at every stage of the proceedings. His right to be free from questioning or molestation by any one after being committed to jail awaiting trial and before conviction, is certainly a constitutional right of every person accused of, but still presumed innocent of any crime until convicted by a jury.

We contend that such procedure violated due process under the Fourteenth Amendment to the Constitution of the United States.

[fol. 2516]

Conclusion

Three learned and eminent justices of this Honorable Court have to date expressed their views that grave errors, requiring a reversal of the judgment occurred in the trial of this case.

We now ask this court to determine whether, under the rights guaranteed by the Constitution of the United States the Appellant has been denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, upon each of the grounds hereinbefore enumerated.

In the view which we take of the matter, the life of the Appellant is the least important thing involved here. The preservation of those principles guaranteed by the Fourteenth Amendment to the Constitution of the United States that have been proved by the universal experience of mankind and that have been thought to have become a part of the fabric of our Government; the maintenance of that uniformity of decision which lends stability to the administration of justice; the retention of confidence in the judicial branch of the State Government as rising above the passions and prejudices that sway the mind and control the actions of the populace—these transcend in value the life of any man. Because we think that the decision in this case is inconsistent with those principles guaranteed by the Fourteenth Amendment; that it destroys the uniformity of decision heretofore maintained; that it constitutes a departure from the current of judicial decision in this State and of the United States; that it rests upon a foundation so unsecure that it is difficult for the mind to be satisfied with it, are reasons that impel us to direct the attention of the Court to the Constitution of the United States, the Fourteenth Amendment, and the sacred rights guaranteed thereby and to have this court rule now whether those rights have been denied or abridged in violation thereof.

These rights involved are the right to have a trial free from the venom of rattlesnakes hissing ominously at the jury and the passion and prejudice engendered thereby; the right to be free from third degree brutal methods and unlawful seizure, and the use of a purported confession obtained thereby; the right to be free from the mental torture of sleepless days and nights and under such duress securing of statements which were used against appellant;

the right to be free from a conviction based upon perjured testimony; the right to be placed upon trial only upon a charge contained in the indictment and not upon one in another state where one has no notice of the same or opportunity to meet it, and without the processes of the court to bring witnesses before it to rebut this improper testimony. That under these circumstances a trial and conviction based thereon are violative of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, the Supreme law of the land.

[fol. 2518] This is a case of circumstantial evidence in which there is no important circumstance proved against the defendant by any credible evidence. The alleged confession, extorted under brutal, third-degree methods, which has been relied upon as an instrument of his destruction, is characterized by the prosecution as a pack of lies. The testimony of Hope involves physical impossibilities, is inherently incredible and proceeds from a man of a character so low that the prosecutor should have considered well whether he had a moral right to ask a jury to rely upon it.

While it seems unthinkable that the life of one human being should be adjudged to be taken through the use of the high-handed procedure used by the State and the instrumentality of the incompetent and false evidence placed before the jury in this case, the enormity of the wrong which will result should the judgment herein be executed lies in the fact that a precedent would thereby be established, judicially condoning and approving the use of the most extreme and illegal third-degree methods by law enforcement officers to obtain convictions and endangering the liberty and life of every citizen or resident of California, whether guilty or innocent of wrong doing, and compelling the unrelenting and blind enforcement of such judgment, regardless of the fact that the testimony upon which the conviction has been secured is thereafter shown to have been perjured.

To have seen the District Attorney stand sponsor for the wholly unreliable testimony of that abject wretch Charles Hope, whose polluted lips are incapable of speaking the truth and who has since branded his testimony as false, and whose perverted moral sense makes him a willing instrument for the taking of any life by any means; to have listened to the fantastic incredible testimony of this abandoned wretch and then at the psychological moment, at the

time when their production was necessary to distract attention from the inherent weakness of his testimony, to have seen two live rattlesnakes carried down the aisle, sounding their ominous warning, while spectators gasp and a visible wave of terror sweeps over the court room; sounding not only their warning but the doom of this appellant; to have seen every prejudicial circumstance that could be dragged into light, however trivial it might be, brought forward and received as evidence against appellant; to have listened to [fol. 2520] the testimony of a paid medical expert witness whose conscience must have shuddered at the testimony he gave; to have listened to another such witness while he was permitted over all objection to wander into the dim paths of conjecture, all this was to undergo an experience of which the cold record presents only a vague shadow, and all of which was in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Wherefore, appellant prays for rehearing of the cause, and reversal of the judgment and of the order denying a new trial, so that defendant may be tried under due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States, and in order that it may be fully determined whether the testimony of Hope, given in the first trial, was perjury.

Appellant further prays that in the event this court does not reverse the order denying a new trial, that a reference be appointed to take further testimony regarding the case.

Appellant further moves and prays that this court receive in evidence pursuant to Article VI, Sec. 4³/₄ of the Constitution, 956a of the Code of Civil procedure, and Rule 38 of the Supreme Court, the certified copies of the affidavits and letter of Charles H. Hope, received by the Superior Court of Los Angeles County since the trial of the case. [fol. 2521] Appellant further prays that in event this motion and prayer are denied, that a reference be appointed for the further taking of testimony of Charles H. Hope, and for the ascertainment of the true facts regarding whether this conviction is based both on perjured testimony and upon conduct in violation of the defendant's rights of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Fortunately, the corrective processes of the State, referred to by the United States Supreme Court in *Mooney v.*

Holohan, 294 U. S. 103, and in Jones v. Commonwealth of Ky., 97 F. (2d) 335, are still open to do justice in this case in accordance with the law of the land guaranteed by our Fourteenth Amendment.

Respectfully submitted, Morris Lavine, Wm. J. Clark,
By Morris Lavine, Attorneys for Appellant.

[fol. 2522] Received Copy of within document, Oct. 25, 1939, Earl Warren, Atty. General, by Warner Q. Praul, Deputy.

[fol. 2523] IN SUPERIOR COURT OF LOS ANGELES COUNTY

No. C-64218

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

MAJOR RAYMOND LISENBA, Also Known as, Robert James,
and CHARLES H. HOPE, Defendants

AFFIDAVIT AND MOTION OF CHARLES H. HOPE TO WITHDRAW
PLEA OF "GUILTY", AND FOR AN ORDER OF COURT SETTING
ASIDE JUDGMENT, AND AN ORDER GRANTING A NEW TRIAL

STATE OF CALIFORNIA,
County of Marin, ss:

CHARLES H. HOPE, being first duly sworn, deposes and says:

1. I am the defendant, Charles H. Hope, named in the above-entitled action, now imprisoned in the State Prison at San Quentin, under a judgment of the above-entitled Superior Court finding me guilty, upon my plea of "guilty", in the above-entitled matter; that I was not, and am not guilty of the crime of murder or any other crime, and that said judgment against me is void, because of fraud practiced upon me by the prosecuting officials of the State of California in inducing me to enter a plea of "guilty", under [fol. 2524] a misapprehension of facts by which my legal right to defend a was taken from me by a specie of fraud, all as hereinafter set forth. That I make this affidavit, to lay the foundation for a motion in said court to set aside said judgment and to permit me to withdraw said plea of

"guilty", and to enter my plea of "Not Guilty" and to defend said charge on the merits.

2. Affiant avers that he has read and studied the opinions of the Supreme Court of California, in *People v. Lisenba*, the above-named joint defendant, 97 Cal. Dec. 378, and is convinced from a reading thereof, especially of the dissenting opinions in said case upon which a rehearing has been granted as affiant is informed, that much of the same applies to the facts of his situation and that he is not bound in law by the confessions, statements and testimony forced from him under the circumstances hereinafter related and that it is his privilege and right, in the interest of justice, to repudiate and retract same, and that your affiant does now wholly repudiate and retract any and all statements, alleged confessions, and testimony given by him upon the trial or any other place in connection with the above-entitled matter and proceedings, as not having been free and voluntary, and as having been induced by the fraud, duress, fear, coercion and threats, and false promises of the District Attorney, his deputies and investigators of which affiant will offer testimony in open court upon the hearing of this Motion.

3. Affiant avers that from the very inception of said proceedings, from the time of his arrest on continuously throughout the trial and until very recently, he has been and was subjected by the investigators and deputies of the district attorney's office of Los Angeles County, acting for said Plaintiff State, as officials of such, to a constant pressure of fear and threats, and that he was induced by said fear and threats and by false promises to make the statements and to give the testimony against himself and co-defendant which he did give; that from the very moment of his arrest, your affiant protested his innocence and stated that he was not conscious of having committed any crime or having done anything wrong, but that for nearly eighteen (18) days after his arrest and before any attorney was secured or allowed to consult with him, he was held in the private custody of the officers and investigators of the said plaintiff, incommunicado, that he requested an attorney and was refused the right to an attorney and was not allowed to see one; that during that time he was subjected to a constant grilling and drilling in the story which said deputies

of the State wanted him to tell; that all of said testimony so given on the trial was by them carefully rehearsed by them to him and he was induced by threats and false promises so to testify. That your affiant is now informed that under the decision in *Peo. v. Lisenba*, 97 Cal. Dec. 378, the refusal to allow him counsel at that state of the proceedings, when the guilt or innocence was being decided, in the most important preliminary steps, so illegally conducted by the prosecuting [fol. 2526] officials as aforesaid, such refusal of counsel violated his rights under the Statutes and Constitutions and render such statements, admissions and testimony incompetent and inadmissible against him. That it is his desire to and he does hereby repudiate and retract same "*in toto*," that is to say, in whole and not in part.

4. Affiant avers that during said eighteen days, after his arrest, when such statements were being extorted and such agreement to testify being forced upon him, he was taken to the office of the District Attorney, who threatened him in these words:

"If You Don't Co-operate with Us, Tell the Truth as It Is, *I Will Frame You if I Have to.*"

That said District Attorney (Mr. Buron Fitts) then and there shook his fist in my face and told me if I did not co-operate he would get me if he had to frame me. That your affiant believed said threats and was greatly put in fear thereby, to such an extent, your affiant avers, that his free will and agency were completely destroyed, and he thereafter did as he was bid to do by said prosecuting officials, that is to say, did enter the said plea of guilty, although he was not in fact guilty, and did testify as he was told to by said prosecuting officials, the same being the testimony given by him on the trial.

5. That at said time and place, said district attorney further threatened your affiant, "I'll try you with him and I'll hang you with him if you don't do as you're told." The [fol. 2527] above in his office during the investigation. When I asked to see a lawyer, they refused, and said they would get the public defender to represent him, as they said they could "co-operate." That this constituted the use of force or offer of force and violence against me. Mr. Robert Stewart, then a deputy district attorney, then present at one such meeting, told Mr. Fitts in my presence, "You

would rather have this case at this time before election than anything on earth. *Stop threatening* the man and listen to him."

6. Affiant further avers that he was induced to enter said plea of guilty by the above mentioned threats and fear, and by the false promises and false representations on the part of the district attorney made to affiant that if he would enter said plea of "guilty", it would be a mere matter of form, and that after the James trial was out of the way, they would then extend him leniency and recommend same and that they would allow the court to hear and decide from affiant's evidence that affiant had not been guilty of any crime, or if he had become involved in some unknown manner in not fully or properly reporting his knowledge, that he would be found guilty of such minor misdemeanor only, and that he would be given full opportunity to defend and present any and all evidence; that affiant did not understand that he was entering a plea of Guilty to Murder in any degree or to homicide in any degree; that your affiant was not and is not guilty of murder or manslaughter, either as a principal or accessory before or after the fact, and that [fol. 2528] whatever he did he did in good faith and without criminal intent and without knowledge of wrong doing if there was any, which is the substance of his repeated statements to the district attorney and upon the basis of which it was agreed between the parties that the court should enter its decision; that it was never in contemplation of affiant's mind that he would plead guilty to murder or be found guilty thereof. That said promises and agreements were believed and relied upon by affiant; that they were false, were known to be false by the district attorney and his agents and were knowingly made with the intent to deceive and mislead this affiant and to induce him to enter said plea of guilty, and that the same did have that effect. That upon the conclusion of James trial, your affiant was given no opportunity to Defend such as he had anticipated and as he had been promised; the foregoing promises were broken and your affiant was summarily found guilty of murder in the first degree and thereafter sentenced for same. That the foregoing facts and other facts which affiant will adduce in support hereof constitute fraud on the part of the prosecuting officials and render said plea and judgment void.

7. That the illegality of the proceedings, the violation of the numerous criminal statutes and clauses of the Constitution for protection of citizens placed as defendants on trial, and knowingly and wilfully compelling both defendants to give false testimony against themselves has been pointed out by the Supreme Court of this State in the decisions in the case above mentioned *Peo. vs. Lisenba*, and [fol. 2529] that the same apply to your affiant, and your affiant makes all of same a part hereof by express reference in this behalf, as showing a scheme and general plan of action on the part of the prosecuting officials themselves, which render the same admissible, under the same theory which they used to introduce incompetent and inadmissible evidence of previous alleged "crimes" of like nature against co-defendant of your affiant.

8. That ever since the consummation of said fraud as aforesaid, your affiant has been as "the voice of one crying in the wilderness", that he was unjustly and fraudulently convicted of a crime which he did not commit, if any crime was committed by any one; and in this behalf, affiant avers that he was acting under stress of hysteria and excitement, threats and fear at the time of the trial, but that subsequent reflection has lead him to the believe that his co-defendant James was in such a condition of mind as to be temporarily incompetent whether from alcohol or otherwise, and his evidence hence of no value, (Mythomania) at the time James found the dead body of his wife, following a long series of attempts on her own part to commit the crime and wrong of Abortion or infanticide (murder of baby) and as a direct result of the effect of the drastic medicines and methods resorted to by her to that end which unfortunate misdirection of mind on her part has caused suspicion to point to those who were in contact with her; that your affiant does not believe that defendant James was capable of under-[fol. 2530] standing what he was saying or doing, due to intoxication and mental condition then present, and his statements were of no evidentiary value and were not believed by me; that your affiant has no personal knowledge as to whether or not a crime was committed by any one except the decedent, who, according to testimony, was engaged in attempted abortion of herself, a very dangerous thing, especially if followed by a bath and severe hemorrhages followed by sudden heart failure; whether or not she

drowned herself was drowned accident-ly, affiant does not of his own knowledge know and upon a new trial he will contest the right of the state to introduce any statements or testimony of alleged confessions or testimony on the previous trial, and will put the State to their proof, believing that they have no evidence and can produce none sufficient to justify this case being given to a jury. That the course of action described in Dissenting Opinion of the Supreme Court, as to the building-up of a case by over-zealous and ambitious officials, who had created a certain theory in their own imagination, and then sought to compel affiant and others to give false testimony to fit that vision, affiant avers to be true in fact.

Specific Accusation and Complaint Against State Prosecuting Officials (District Attorney and Men) for "Willful or Corrupt Misconduct in Office" Under Sections 658 and Section 771, inclusive, of the Penal Code of California.

[fol. 2531] 8-A. Affiant Charles H. Hope further specifically avers that in the "statement" filed by the district attorney on file in this case it is said: "Hope, (affiant herein), was an accomplice of Major Raymond Lisenba, in an effort to kill Lisenba's wife by rattlesnake poison, *although this method of killing the wife failed*, Lisenba completed the job by drowning her in a bath tub." affiant avers that the decisions of the courts hold, and it is the law, that where an alleged attempt to murder fails, and where death ensues not from such attempt but from supervening or subsequent causes, or a separate and independent assault with which the accused had no connection and no participation, or knowledge or intent and no pre-conceived design, it is a good defense entitling him to an acquittal. That before the jury and court were justified in finding affiant guilty of murder in the first degree, as the court did find this affiant so guilty upon his plea of guilty to whatever crime the evidence might show and not his plea of guilty to murder as has been falsely shown by the record, due to a mistake of fact, it was incumbent upon the state to prove beyond a reasonable doubt that the alleged attempt against life by rattlesnakes caused the death, and that said rattlesnakes were not merely on the premises, but that they actually struck and bit the deceased infecting her with fatal poison, proven beyond a reasonable doubt as a cause

of death. If doubt existed, affiant was entitled to an acquittal. Affiant accordingly avers that the procurement of false testimony by the state, knowingly and willfully that [fol. 2532] the rattlesnakes had bit the deceased, when as a matter of fact affiant refused to so testify and said that that story was all "bunk" or untrue, was very material matter, which the state prosecution officials know and knew to be false, under secs. 127, 128 Penal Code.

8-B. Affiant avers that this issue, this theory of the prosecution of death by rattlesnakes was and is a false one and was known to the state prosecuting officials to be false; that for many days prior to the James trial, affiant was subjected to a constant gruelling by the district attorney and his staff of investigators, in which he was solicited, procured and requested to falsely testify against his will and wish for and on behalf of the State to the rattlesnake fiction or story now of "Macbeth hellish brew of the dancing witches" fame, Vol. 97 Cal. Dec. at p. 463, *Peo. v. Lisenba*, this case due to such characterization by the classic or classical opinions of the Supreme Court of California, a part of the law of this case, of which this court must take judicial notice and knowledge; affiant avers that prior to taking the stand he at all times told the said state prosecuting officials C. H. among them Messrs. Buron Fitts, Bob Stewart, Scott Littleton, Jack Southard, and others mentioned in the transcript of the trial as being present, to which reference is hereby made for further particulars, that to his knowledge no rattlesnake ever bit or poisoned James' wife; but notwithstanding their knowledge of the falsity of same, said state prosecuting officials did coerce [fol. 2533] and compel this affiant, by threats of framing him and hanging him, and by intimidation as well as by false promises of immunity and release, too numerous to mention, to testify falsely that the rattlesnakes of the district attorney's creation had in fact struck at, bit and poisoned the James wife, in the presence and seeing of affiant; affiant will restate this elsewhere in his affidavits, to supply other elements to make it clearer.

Affiant here avers in the first person:

I was held incommunicado in Glendale, brought from there to Grand Jury room (had never seen a lawyer) and told by Jack Southard that I would be told in the

"room" that I had rights but that I had better disregard that and tell the story that they had given me and that had been gone over by them with me *hundreds of times*. (See p. 421, of *Peo. v. Lisenba*, 97 Cal. Dec. 421); also to say that I had not discussed what I proposed to testify to with any one, also to say that I had not been promised anything, the state prosecuting officials well knowing all this to be false and untrue.

Affiant further avers in the first person:

"During James trial as I was preparing to take the stand, Southard told me it was *absolutely necessary* to say I saw the snake bite the woman, I refused. He said I would at least have to say the snake struck at the woman. He explaining that I should say this and not that I did not know. He further stated to me, 'You'd Better! You're Not Out of This Yourself Yet.' "

[fol. 2534] "The further part of the District Attorney in not allowing my day in court and setting degree after my plea without defense promised and until after I had testified and holding a death threat over me if I did not.

I hope this makes it more clear. However, the thing is simply this as far as I'm concerned,—*all its doctrines were conceived in error, founded on fallacy, propagated by falsehood, and are, in short, puerile, idiotic and utterly asinine.*

(Copies from Memorandum to Scribe in my own handwriting May 11, 1939.)

Affiant will ask leave of court for a continuance for time within which to prepare and file his evidence as to the false promises operating upon the entry of plea of guilty and upon procuring of the false testimony on the trial, as his present time and situation, without private counsel, necessitates. Suffice it to say that this pretense of friendship for affiant and his wife extended throughout the conversations and contacts and proceedings both before and upon and after the trial and up until a very recent date, and said promises and agreements were tantamount to assuring this affiant that he would be found guilty of a minor misdemeanor, or after the surprise conviction resulted, the story was adapted to the situation to include an immediate commutation of sentence or pardon as soon as the case should be settled in the Supreme Court and James hanged. They promised but failed, to take the stand in my

C. H. Hope

[fol. 2535] defense. ~~Promises extended to assistance to~~

C. H. Hope

~~the family of your affiant, and lucrative employment.~~

That none of said promises were ever kept; that they were wholly false, made in bad faith, and were elements of deception and fraud entering into the trial and proceedings above mentioned. "A bill of particulars" will be furnished any one on request.

1. That, at and within the County of Los Angeles, State of California, on or about June 22, 1936, said persons and each in pursuance of their pre-conceived plan, and acting in common concert did plan to procure convictions by inducing and using false testimony did threaten and abuse this affiant that if he did not testify that rattlesnakes were used to cause death that they would frame affiant and hang him; that he was subjected to the same kind of insistent questioning for hours and treatment such as was administered to James, and that the same finally broke down his will and despite his original insistence to the contrary, he was compelled by threats and in mortal fear of his life, as well as induced by the false promises of immunity referred to in other parts of this affidavit, to testify to the rattlesnake story on the trial; that the same was substantially false and known to the district attorney and his said men to be false.

2. Affiant further avers that, since his imprisonment he has obtained what purports to be a copy of the reporter's transcript of July 24, 1936, when he was found guilty [fol. 2536] or sentenced that he has remained in ignorance of the legal significance of this statement:

"There Already Has Been a Stipulation That the Court Might Take Into Consideration the Evidence Given in the Trial of Major Raymond Lisenba, Also Known as Robert James, Under Indictment with This Defendant, for the Purpose of Fixing and Determining This Matter."

Affiant avers that this is stark fraud, in that he never at any time ever stipulated or agreed thereto; that at the time of that hearing in court, your affiant did not even know what the word "stipulation" meant, and that he did not understand that by that means the district attorney was having him agree that the testimony of his co-defendant, and all

other testimony given in James trial, would be used against him for the purpose of determining what crime, if any, he had committed; but on the contrary affiant avers that he at that time believed and was led by the statements of the district attorney and his own counsel to believe, that only affiant's own testimony would be considered; that affiant had expected to be given opportunity to introduce further testimony corroborative of his own testimony of innocence and lack of knowledge of crime, but that no adequate opportunity so to do was given. That your affiant was as ignorant of that legal effect of said "stipulation", as he believes that the Supreme Court points out that his co-defendant was of the like trick of the District Attorney in asking James if he had anything to "add" to affiant's state-[fol. 2537] ment; the effect in both cases being to bind them with statements and testimony, without their knowing or intending it. That your affiant never at any time authorized his counsel or any other person to make such stipulation or any stipulation of like nature; that your affiant was likewise ignorant of the legal effect of the further stipulation in the record that day that he was present during the taking of such testimony of James, so used against him without his knowledge; that he was ignorant of the law that he was required to deny the truth of said testimony or be bound thereby. That therein and thereby your affiant's Constitutional right to the assistance of counsel was violated, and he was and is deprived of his liberty without due process of law, which is here set up and assigned as a violation of his rights under Sec. 13, Article I of the California Constitution, and the Fourteenth Amendment to the United States Constitution. That said facts are also detailed as facts of fraud.

3. Affiant wishes the court to see that counsel are in attendance, that a continuance of 30 days or reasonable time be allowed to prepare and file further evidence, and prepare for trial, and that an order for his attendance as a witness be made; affiant further desires that the court make its order prohibiting any member of the district attorney's staff or any officer of California interested in prosecution from contacting, intimidating or molesting affiant or subjecting him to any undue restraint or in any manner to unduly influence his free and voluntary pursuit of this pro-

ceeding; that counsel not associated with either district attorney [fols. 2538-2539] or previous public defender's office, be appointed; that the present district attorney and staff be disbarred and suspended from prosecuting this action, and that the court appoint the Attorney General to supersede him.

4. Anticipating the usual denial of omission of public duty, affiant also quotes from Shakespeare, Author of Macbeth, a classic drawn from by the Supreme Court as to the hellish brew of the witches in that like fantastic creature of the imagination, here paralleled by the State prosecution, and predicts that their answer in substance will be: as that of the daughter banished *from* treason: in "As you Like It"

"Never as much as in a thought unborn
did I offend your Highness; (answered)
Thus do all traitors: if their purgation
did consist in words,
They are as innocent as grace itself."

Wherefore, your affiant prays that said judgment be set aside; that he be allowed to withdraw said plea of guilty, and enter his plea of not guilty; that he may have the further and additional incidental relief all as fully indicated as desired in paragraph eleven (11), above; and that he may have such other and further order or judgment as may to the court seem fit and proper.

Charles H. Hope.

Subscribed and sworn to before me this 22nd day of June ~~May~~, 1939. C. H. Clinton R. Duffey,
[fol. 2540] Notary Public in and for the County of Marin, State of California. My Commission expires Sept. 3, 1942. (Seal.) Apvd.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 2541] (Endorsed:) Crim. 4068. People v. Lisenba. Filed Oct. 25, 1939. B. Grant Taylor, Clerk, by Coultis, L. A. Deputy. Filed June 26, 1939, L. E. Lampton, County Clerk, by C. K. Boardman, Deputy.

[fol. 2542] IN SUPERIOR COURT OF LOS ANGELES COUNTY

No. C-64218

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

MAJOR RAYMOND LISENBA (also known as Robert James),
and CHARLES H. HOPE, Defendants

AFFIDAVIT OF CHARLES H. HOPE AS TO FURTHER SPECIFIC INSTANCES OF KNOWING INDUCEMENTS AND USE OF FALSE TESTIMONY BY DISTRICT ATTORNEY AND HIS DEPUTIES AND INVESTIGATORS

Filed in Support of Charles Hope's Motion to Withdraw
Plea of "Guilty" and to Set Aside Judgments

STATE OF CALIFORNIA,
County of Marin, ss:

Charles H. Hope being first duly sworn, deposes and says: I make this affidavit to supplement the affidavit and motion filed by me in C-64218, in the above entitled proceeding of People vs. myself and James or Major Raymond Lisenba.

1. I had no idea that said state prosecuting officials secretly and fraudulently intended to use the same false testimony which they induced me to give as aforesaid against me in my own hearing, as well, which they later did by [fol. 2543] the trick and device of a stipulation the mean- of which I was ignorant.

2. Reading these affidavits in connection with what is said in the dissenting opinion of the Supreme Court in *Peo. v. Lisenba*, 97 California Decisions, 378, affiant invites attention to at least three specific instances of violation of law by State prosecuting officials referred to, to wit, section 137 and other sections of the penal code, "upon understanding and agreement that the testimony of said witness shall thereby be influenced or who *attempts by any other means* fraudulently to induce any person to give false or withhold true testimony is guilty of a felony"; and in this behalf, affiant invites attention to the fact that the forcing of confessions from James and affiant both, and the attempt

thereby to induce both of us to give false testimony is also a felony of and in itself. Affiant avers that his own conduct in giving such testimony was so induced was not wilful, but excusable because given under duress of threats of death by hanging, as well as false promises referred to.

3. The three specific instances, among others, of the knowing inducement and use of false testimony by state officials is as follows:

1. That the snake bit and poisoned the decedent, thereby enabling the state to supply a missing vital and material element of the corpus delicti of the offense charged, when the said district attorney and his deputies and investigators [fol. 2544] knew the same to be false, knew that affiant knew it to be false, and which affiant knew to be untrue;

2. That no promises of leniency or reward had been made to affiant, to induce his testimony,

3. That no threats had induced the false testimony; in instances "2" and "3" entering into the deceit practiced on the Court and jury, and being material evidence going to the credibility of the witness and the weight to be given by the jury to the witnesses testimony.

A number of other specific instances can be stated as to forcing me to testify that the woman moved or let out a sound and showed signs of life, to prove she was alive, at the time they claimed she had been bit by the snake; and inducing me to place the time of my arrival at the house several hours earlier, and to supply other deficiencies in their proof.

Affiant avers that said state prosecuting officials practiced Collusion on the court and jury in attempts to give credence to the State's theories and case, (quoting from dissenting opinion, (399- to 469) "if death was in fact caused by an attempt to perform an abortion, he would not have thrown away an opportunity to avail himself of that defense", and practiced collusion also by the false representations upon the trial to the court and jury that affiant's testimony was free and voluntary and not exacted by promises of immunity but "having been moved solely by the promptings [fol. 2545] of conscience, and not at all induced by promises or understandings", as pointed out to be material by the Supreme Court at p. 403 of said Opinion; and that as a

part of said practice of deceit, deception and collusion, one of said court officials, as a part of such prearrangement and design to improperly influence the jury and to further this deception, could hardly control himself when Judge Fricke went off half-cock and found me guilty of first degree murder, but dashed by me on the stairs, unlocked the jury door and told the jury then deliberating James' case that mine had been set at first degree murder." That this was part of the pre-conceived plan to improperly influence a verdict and was done in order to lend credence, and to dissipate suspicion that the thing was not wholly above-board but induced by promises and as the result of collusion and a collusive understanding and connivance between the state prosecuting officials and affiant. This was also done to buttress and strengthen the state's argument to the jury (p. 403 of the Opinion: "That if the abortion theory was true, Hope would have been a foolish man to have entered a plea of murder in the first degree with a possibility of suffering the extreme penalty"; and the announcement that affiant had been found guilty of murder in the first degree amounted to the giving of evidence to the jury in an unlawful manner, with the covert purpose of unduly and fraudulently influencing their verdict, in connection with said other acts and said conduct forming a part of and [fol. 2546] overt acts under said general scheme and pre-conceived plan, design and conspiracy to obstruct and pervert the administration of justice and to improperly influence a verdict.

That affiant was induced to give false testimony by said state prosecuting officials which they knew to be false, which he knew to be false, and which they knew that he knew to be false, and that they did so with the corrupt motive and purpose of supplying defects in their evidence and to improperly and thereby unlawfully convict both affiant and his co-defendant of murder in the first degree, as well as to keep from the jury the due consideration of any lesser offense included in the charge or shown by the evidence, under the improper mandatory instruction thereby obtained of the Court that "if it returned a verdict of guilty, it could not be less than murder of the first degree" (p. 403 Opinion). Also to avoid a fatal variance between offense charged and the evidence, requiring a dismissal of the case.

Affiant avers that he was informed by his counsel, Mr.

Cuff, a public defender co-operating with district attorney in the disposition of criminal cases, that said counsel had been informed by Eugue D. Williams, Deputy District Attorney then in charge of the case, that they (the State) had "nothing on" affiant, that your affiant believed and relied on said statement which was knowingly falsely made to deceive your affiant, that your affiant was thereby misled and deceived and taken by surprise, and as [fol. 2547] he wrote Judge Fricke later protesting the action (letter of affiant to Judge Fricke, May 19, 1937, replied to by said Judge on June 10th, 1937, Exhibits —, annexed to first affidavit, hereby made a part hereof by express reference in this connection), affiant was "dumbfounded" when the court summarily pronounced him guilty of 1st degree murder; that said Mr. Jack Southard and other deputy district attorneys or investigators, with knowledge of all other state prosecution officials, had falsely represented to his affiant and led him to believe that he and they would take the stand in behalf of affiant and introduce evidence of innocence in his behalf and use their best efforts to secure his release; that all of said promises were wholly false, made to deceive affiant, did deceive affiant, and were made corruptly to influence and induce said plea and his said testimony as aforesaid; and did induce same; and same are here set forth as facts and circumstances of fraud; that affiant did not know that his plea of guilty could and would be received as a confession of murder in the first degree or murder and he did not intend it as such, but only as a subterfuge or arrangement under his understanding or believed understanding with the state prosecuting officials under which he would later possibly be found guilty of a minor offense such as failing to properly or promptly report as to the facts, or possible complicity in an attempt of some kind to conceal evidence, if affiant was guilty of any crime or misdemeanor, which he does not believe he [fol. 2548] was; that affiant was taken advantage of and thereby by fraud deprived of a trial and right of trial on the merits, in circumvention and violation of his rights under sec. 13 Article I California Constitution and the Fourteenth Amendment to the United States Constitution; that for this reason the proceedings and judgment are void, as the law does not countenance a district attorney thus manufacturing false evidence to imprison.

I aver that said plea of guilty, said testimony on the

trial by me, my statements to the prosecuting officials before and at the trial, and the said judgment were all secured by said state prosecuting officials by the practice of deception and fraud by the said officers on the court and jury and upon me; I aver that the said plea of guilty and said judgment and said false testimony were all procured and induced by said state prosecuting officials by the exercise of intimidation upon me. I further aver that I informed representatives of said district attorney before and after the trial in substance as follows: "That stuff about snakes is the bunk: the snake never bit the woman and you know it." That the said snakes were first introduced into the picture by the investigators of the district attorney's staff, and as affiant earnestly believes had nothing to do with the cause of death.

I do therefore intend to and do hereby revoke and repudiate all of said statements and testimony as having been induced by fraud, duress by threats of hanging and im-[fol. 2549] prisonment, and fear, and as not having been free and voluntary, and as having also been induced by false promises of immunity and release made by said state prosecuting officials to me, which have never been kept, and do further aver that said state prosecuting officials even up to within a short time ago, to wit, November, 1938, at San Quentin, California, repeated to me their promises and said to me, "We will keep our word: You *keep quiet*"; affiant avers that thereafter said state prosecuting officials wrote a letter to a chaplain at the prison, repudiating their promises and denying same and stating they would oppose any effort affiant makes to upset the case:

As a specific instance of intimidation and duress inducing said false testimony, affiant avers that just before going into the court-room to testify, the state investigators threatened him, saying: "*Now you be damn sure that you swear that the snake struck at the woman and bit her foot*", also, "*Be sure you testify that we have made you no promises, and that the snake struck at the woman's foot,—you are not out of this yourself*", and thereby sought to and did put affiant in fear and thereby attempted to and did induce him falsely to testify that those were the facts; that affiant was thereby put in fear by said threats and intimidation and solely because of fear and said promises, he testified as to the snake incident, falsely, against his will and wish, and over his protest to said district attorney and his staff that

[fol. 2550] it was not true in so far as him being an eye-witness; affiant avers positively that said state prosecuting officials knowingly compelled him to give false testimony to material facts in issue on said trial, and not having before him a copy of the reporter's transcript, and it being impracticable to separate each question and answer to identify the true from the false, affiant takes the course of repudiating the testimony as false and fraudulent, in toto, that is in whole. Affiant avers that for many hours and days at a time he was subjected by said state prosecuting officials to a persistent course of threats and insistence that he give false testimony and testimony as abovementioned which he told them was not true, which affiant knew to be untrue, and which they knew to be untrue and knew that affiant knew it to be untrue, to remedy certain defects in their case and to supply the insufficiency of their evidence to make out the corpus delicti (body of the offense of murder by snakes charged); that thereafter they also fraudulently used this same false testimony against affiant himself by "stipulation" which affiant had never authorized nor consented to or understood in legal effect. That thereby affiant was compelled to be a witness against himself in violation of his rights under the Constitution.

Wherefore, affiant prays that said judgment be set aside and that he be allowed to withdraw his plea, and that said [fol. 2551] action be dismissed.

Charles H. Hope.

Subscribed and sworn to before me, this 28th day of June, 1939. Clinton R. Duffy, Apvd., Notary Public in and for the County of Marin, State of California. (Seal.) My commission expires Sept. 3, 1942.

[fol. 2552]

No. Criminal 64218

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND
FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

MAJOR RAYMOND LISENBA (also known as ROBERT JAMES),
and CHARLES H. HOPE, Defendants.

Filed Jun 30 1939. L. E. Lampton, County Clerk. By E. V.
Schwartz, Deputy

Second affidavit of Charles H. Hope as to further specific instances of knowing inducement and use of false testimony by District Attorneys and his Deputies and Investigators, and Facts of Conspiracy, to obstruct and pervert the administration of Justice on part of said District Attorney, his deputies, et al.

Filed in support of Charles Hope's Motion to Withdraw
Plea of "Guilty" and to Set Aside Judgment

To the Clerk of the above-entitled Court:

You are hereby instructed to file the within affidavit in the above-entitled case on behalf of the defendant Charles H. Hope and to bring the fact of the filing of same forthwith to the notice (personally) of the presiding Judge of the Criminal Master Calendar Dept. for appropriate action. Due service by mail made upon Plaintiff. Dated, this 28 day of June, 1939.

Charles H. Hope, Box, 59,885, San Quentin, California, defendant, in propria persona.

[fol. 2553]

Copy

EXHIBIT A

California State Prison,
San Quentin, California,
May 19, 1937.

Hon. Charles W. Fricke, Judge in Superior Court, Los Angeles, California.

YOUR HONOR:

If I am in error in addressing your honor, please be kind enough to excuse me and my ignorance of the proper procedure.

I was identified with the James case, tried in your court, sentenced to life imprisonment. I wish to make a few statements, and ask a few questions—of a confidential nature—if it please your honor.

Is it correct that the trial judge has no jurisdiction over cases after one year? If I were to prove to you, beyond doubt, that I did not conspire, and that I was in ignorance of what was going on, would you recall me to review some vital evidence, smothered, when I appeared before you for sentence?

This takes me back a year, when, in a conversation with the late Deputy District Attorney, Mr. Bob Stewart and investigator Jack Southard, I maintained, throughout, I was not guilty of murder, or that I had any knowledge of a murder being planned. So, they put it up to me in this way.

“Did I think I had done something wrong?” I answered [fol. 2554] yes, but I didn’t know to what I would be willing to plead guilty. My thought was to lay the facts before the court, and let the court decide; this with the understanding that I should have the opportunity of explaining my side of the case.

A few days later Mr. Southard came to me and said: “Everything is taken care of, and you are to have your day in court, at the end of the trial.” I was not very enthusiastic about the arrangement, until later, Mr. Cuff came and reassured me of the same promises. I asked him point blank if a judge could free me, or fix sentence on any charge the evidence might warrant. He told me—“Yes”. He did say, however, that I would do some time,

regardless of any evidence, although to this day he does not know what I was prepared to present; namely, I think, because he went into it only far enough to satisfy himself, that I had killed no one,

Well, they talked me into the plea of "guilty" and we came into your Honor's Court. Among other things said, I remember because I was particularly listening for it, was your Honor's remark, that the degree of crime and time of punishment would not be set until after the evidence was presented. This was what was promised me, what I considered fair, naturally assuming this meant all the evidence; proof that would throw an entirely different light on the case, as it affected me, as well as bring some startling facts to light.

[fol. 2555] My day in court arrived, and Mr. Cuff stated that they were ready to present our case. The court replied, "that it would do no good, His mind was already made up—it was first degree murder." I was dum-founded, and arose to object when Mr. Cuff failed to do so, but he merely pushed me back and said; "Keep still!" Later he put me on the stand and asked a few unimportant questions, to which I made answer, thinking all the while . . . "I am found guilty of murder, when I know I am innocent and can prove it." But how? The chance I had been promised in order to get me to plead guilty so I could testify never came.

I cannot bring myself to believe your Honor was aware of this and various other things, I was led to believe you knew, and still not give me the opportunity to tell my side of the story. Neither do I like to believe, it was a deliberate breach of faith on any one's part, rather, the importance of secret information appeared negligible to my advisors.

For example;—an insignificant one if you choose—Can the District Attorney give a complete and coherent solution as to how Mr. James came to be watched after these many months, and finally arrested on incest? I have read some six or seven versions of it. None agree. I can tell you in three words what caused it and why it was done. Does a person *guilty* of crime go this far to be caught?

I have heard many times, that, though severe, your Honor is fair and just. I believe this to be a fact—there- [fols. 2556-2557] fore this letter. Give me a chance to remove some of the shame and disgrace that has been heaped upon those I love; the stigma I have borne, unjustly. My

burning desire to appear before you and tell my complete story is born after months of meditation and sane deliberation, without malice toward anyone, only that justice may prevail.

It has been over a year since my arrest. My record at Folsom and since I have been transferred here is clear. I do my work to the best of my ability and mind my own business.

May I please expect a reply from you at an early date.

Yours very respectfully, Charles H. Hope. Box
#59885, San Quentin, Calif.

[fol. 2558]

Copy

EXHIBIT B

THE SUPERIOR COURT, LOS ANGELES, CALIFORNIA

Charles W. Fricke, Judge

June 10th, 1937.

Mr. Charles Hope, box 59885, San Quentin, California.

DEAR SIR:

I received your letter, but your problem is one in which I cannot act to represent you, as I was the Judge in the case, and your personal problems will have to be handled through an attorney.

Yours truly, Charles W. Fricke.

CWF:MTD

Clerk's Certificate to foregoing papers omitted in printing.

[fol. 2559]

Crim. 4068

PEOPLE

VS.

LISENBA

Filed October 25, 1939

B. Grant Taylor, Clerk. By Conesis, R. A. Deputy.

[fol. 2560] IN SUPREME COURT OF CALIFORNIA

In Bank

Cr. No. 4068

PEOPLE

VS.

LISENBA

ORDER DENYING PETITION FOR REHEARING—Filed November
3, 1939

By the Court

The petition for a rehearing herein is denied. Curtis, J.
and Houser, J. for a rehearing Carter, J. not participating.
Waste, Chief Justice.

Dated: Nov. 3, 1939.

[File endorsement omitted.]

[fols. 2561-2566] IN SUPREME COURT OF CALIFORNIA

Bank

Criminal No. 4068

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, Re-
spondent

VS.

MAJOR RAYMOND LISENBA, Defendant, Appellant

On Appeal from the Superior Court in and for the County
of Los Angeles

JUDGMENT—October 5, 1939

The above entitled cause having been heretofore fully
argued, and submitted and taken under advisement, and
all and singular the law and premises having been fully
considered, It Is Ordered, Adjudged and Decreed by the
Court that the Judgment and Order of the Superior Court

in and for the County of Los Angeles in the above entitled cause, be and the same are hereby affirmed.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 5th day of October, 1939, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 6th day of November, A. D. 1939.

B. Grant Taylor, Clerk. By I. M. Johnson, Deputy.
11795. (Seal.)

[fols. 2567-2568] [File endorsement omitted]

[fol. 2569] IN SUPREME COURT OF THE UNITED STATES AND IN
THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

PETITION FOR APPEAL—Filed November 6, 1939

Aggrieved by the final decision of the Supreme Court of the State of California on October 5th, 1939, and by the order of the Supreme Court on November 3, 1939, denying his petition in that Court to rehear the said cause, appellant Major Raymond Lisenba hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order permitting the said appellant for leave to proceed in forma pauperis, and that said order, in lieu of a bond, act as a supersedeas.

[fol. 2570] IN SUPREME COURT OF THE UNITED STATES AND IN
THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 6, 1939

And the said appellant Major Raymond Lisenba assigns the following errors in the record and proceedings in said case:

I

The Supreme Court of the State of California in its opinion, decision, determination and judgment of the case of

the People of the State of California v. this appellant erred in holding that the said Major Raymond Lisenba was not denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, in having live, hissing rattlesnakes brought into the court room during the trial of the said case and the said Supreme Court erred in its opinion, decision, determination and judgment that the said bringing of rattlesnakes into the court room during the trial of the said case, by agents of the State of California, and exhibiting them less than two feet from the jury, did not and does not violate due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

II

The Supreme Court of the State of California, in its opinion, decision, determination and judgment of the case of the People of the State of California v. this appellant, erred in holding that the arrest of the appellant on the 19th day of April, 1936, and the forcible taking of him from his home by agents and officers of the State of California without warrant or any process of law, and against petitioner's will and consent, and that the incessant and uninterrupted questioning of petitioner for three days and nights by agents and officers of the State of California during which he was repeatedly accused of numerous acts of a highly criminal nature, including the torture and killing of his wife, Mary Emma James, and the almost incessant questioning of petitioner for a period of nine days immediately thereafter, during which the accusations above mentioned were continually repeated, all of said questioning having relation to said accusations, and immediately preceding and leading to statements made by petitioner in the form of a purported confession of the truth of said accusations, and which said questionings were several times interrupted by said officers brutally beating and otherwise assaulting and seriously injuring petitioner's person,—said questionings and beatings having occurred while petitioner was being held and imprisoned by said officers, without warrant or any process of law, for the first three nights and days without any sleep, [fol. 2572] in a private house, and for the remaining nine days in a public jail and with only brief intervals of sleep between said questionings, all without petitioner's consent,

and the final taking of petitioner to the office of the District Attorney, against petitioner's will and without any lawful or other process and being there further questioned by the District Attorney and his deputies for approximately two hours, without food or sleep and without benefit of petitioner's counsel, and the extorting from petitioner through said acts, questionings and procedure of statements in the form of and purporting to be a confession of guilt, which statements were introduced in evidence during the trial of this case against petitioner's objections, and which statements petitioner made only to terminate the ordeal to which he had been subjected for thirteen days, does not violate due process in this prosecution guaranteed by the Fourteenth Amendment to the Constitution of the United States.

III

The Supreme Court of the State of California erred in its opinion, decision, determination and judgment in the case of the People of the State of California v. this appellant, in holding that this appellant was not denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States when he was placed upon trial in California on the charge of murder of his wife Mary Emma James, in California, and thereafter, during [fol. 2573] the trial of said case, without any indictment, information or judgment, the defendant was tried on evidence from the State of Colorado regarding the death of his former wife, Winona P. James, in Colorado, of which he never was accused and regarding which he never had any court process to secure any witnesses to rebut or refute the testimony so given.

IV

The Supreme Court of the State of California, in its opinion, decision, determination and judgment in the case of the People of the State of California v. this appellant, erred in holding that your petitioner was not denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, when he was deprived of the right of his counsel at any interrogation conducted of him; when he asked to have his counsel present, and without his consent he was removed from the jail, and without his attorney's having been sent for or being present he was removed from the jail and subjected to prolonged and con-

stant questioning, and when statements thus obtained in order to terminate the questioning were permitted to be used in evidence against him.

The Supreme Court of the State of California erred in holding that such proceedings did not violate due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and did not vitiate the verdict.

V

The Supreme Court of the State of California, in its [fol. 2574] opinion, decision, determination and judgment in the case of the People of the State of California v. this appellant, erred in holding that each and all of the above acts did not and do not constitute a denial to appellant of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

For which errors the appellant prays that the said judgment of the Supreme Court of the State of California, dated October 5th, 1939, in the above-entitled cause, be reversed, and a judgment rendered in favor of the said appellant, and for costs.

Major Raymond Lisenba, Appellant, Pro Se.;
Morris Lavine, Attorney for Appellant.

[fol. 2575] IN SUPREME COURT OF THE UNITED STATES AND
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

ORDER ALLOWING APPEAL—Filed November 6, 1939

The appellant, Major Raymond Lisenba, having prayed for an allowance of the appeal in this cause to the Supreme Court of the United States from the judgment made and rendered in the above-entitled cause in the Supreme Court of the State of California on the 5th day of October, 1939, and from an order denying his petition for rehearing made on the — day of November, 1939, and from each and every part thereof, and having presented and filed his petition for appeal, assignment of errors and prayer for reversal, pursuant to the statutes and rules in the Supreme Court of the United States in such cases made and provided;

It is Now Ordered that an appeal be and the same is hereby allowed from the Supreme Court of the United States to the Supreme Court of the State of California in the above-entitled cause, as provided by law, and

It is further ordered that the Clerk of the Supreme Court have prepared and certified a transcript of the record, proceedings and judgment and order in this cause, and trans-[fol. 2576] mit the same to the Supreme Court so that he shall have the same in said court within 60 days from this date, and

It is further ordered that the affidavit for leave to proceed in forma pauperis be filed in lieu of bond for costs on appeal.

Dated: November 6th, 1935.

William H. Waste, Chief Justice of the Supreme
Court of the State of California.

[fols. 2577-2581] IN THE SUPREME COURT OF THE UNITED
STATES AND IN THE SUPREME COURT OF THE STATE OF CALI-
FORNIA

[Title omitted]

ORDER STAYING EXECUTION—Filed November 6, 1939

An order having been duly given and made by this Court allowing the appeal of the defendant, Major Raymond Lisenba, from this Court to the Supreme Court of the United States, and an application having been made on behalf of said appellant for a stay of execution, and good cause appearing therefor,

It is Hereby Ordered that the execution of the judgment be stayed until such time as the above pending appeal is finally determined.

Dated: November 6th, 1939.

William H. Waste, Chief Justice of the Supreme
Court of the State of California.

[fol. 2582] [File endorsement omitted]

[fol. 2583] IN SUPREME COURT OF THE UNITED STATES AND IN
THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

CERTIFICATE OF CHIEF JUSTICE OF SUPREME COURT OF
CALIFORNIA—Filed November 8, 1939

This is to certify that on the 6th day of May, 1936 an indictment was returned against this appellant in the Superior Court of the County of Los Angeles, State of California charging appellant with the crime of murder, a felony; that on the 6th day of May, 1936 appellant was duly arraigned in the Superior Court under said indictment; that on the 11th day of May 1936 he entered a plea of not guilty; that on June 22, 1936 he was placed on trial in Department 43 of said Superior Court and that on the 24th day of July, 1936 the jury returned a verdict finding petitioner guilty of murder in the first degree without recommendation, such verdict carrying with it the death penalty under the laws of the State of California;

That thereafter appellant moved for a new trial, presenting affidavits in support thereof that the presence of snakes in the courtroom had deprived him of a fair trial, among the grounds urged in support of his motion for a new trial; [fol. 2584] that said motion was on the 10th day of September, 1936 denied;

That thereafter and on the 10th day of September, 1936 the court pronounced judgment and sentenced petitioner to suffer the penalty of death;

That petitioner duly and regularly appealed from said judgment to the Supreme Court of the State of California, the court of last resort of this state.

That on the 21st day of March, 1939 the Supreme Court of California, first rendered its decision and judgment, by which judgment the judgment of the Superior Court was affirmed, Justices Seawell and Curtis, dissenting; the opinions of the majority of the court and the dissenting opinions being fully set forth in 97 California Decisions, 378; 89 Pac. (2) 39.

That thereafter appellant duly moved the said Supreme Court to grant a rehearing of said appeal, and that on

April 20, 1939 said Supreme Court ordered that said appeal be reheard.

That thereafter and on the 5th day of October, 1939, Said Supreme Court of California again rendered its judgment upon said appeal, affirming said judgment; Justice Seawell having died in the meantime, his previous dissenting opinion was adopted by Justices Houser and Curtis, as their dissent.

That appellant, within the time allowed by the laws and [fol. 2585] practice of California, duly and regularly petitioned the Supreme Court of California for a rehearing of its decision of October 5, 1939 on the ground that the trial of the cause and the proceedings had were in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and that the judgment was therefore void and appellant particularly set forth:

1. That the bringing of live, hissing rattlesnakes into a courtroom and exhibiting them to a jury were so inflammatory and frightening in its nature as to make of the trial a mock and sham and violate the fundamental guarantee of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. That third degree brutal methods were used upon the defendant Lisenba (Robert S. James) to Coerce and extort a purported confession, and that the use in evidence of such alleged confession obtained by such means and methods make void the entire trial under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. That prolonged questioning without sleep and under tortuous mental ordeal, similar to that employed in the dark ages, and in the torture chamber, were used upon the defendant, and statements thus extorted and coerced were permitted in evidence in the trial. That the use of the Alleged confession in evidence thus obtained by these [fol. 2586] methods make void the entire trial under the due process clause of the Fourteenth Amendment to the Constitution of the United States;

4. That the principal evidence against the defendant was that of an alleged accomplice named Charles H. Hope. That since the trial the said Charles H. Hope has made affi-

deavits and filed the same in the Superior Court of Los Angeles County, stating that his testimony was obtained by deceit, fraud, collusion and coercion and was entirely false; that he was impelled by force and fear, threats and promises and that all these facts, including the falsity of his statements, were known to the prosecution and participated in by them. That testimony thus obtained and a conviction based thereon make a trial a mere pretense and are all in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

5. That alleged evidence of another purported offense in another state was presented in the trial of this case without any indictment, information or judgment thereon and without any jurisdiction of the California court of the subject matter therein, and that said use of said testimony placed the defendant upon trial in California before a California jury on such purported offense, and is in violation of due process of law guaranteed by the Fourteenth Amendment [fol. 2587] to the Constitution of the United States.

6. That Major Raymond Lisenba was unlawfully imprisoned, and isolated in a private building for three nights and days, before being lodged in jail; that he was then held practically incommunicado for eleven days and almost incessantly questioned by officers until the alleged confession was given, and that the use thereof in evidence in the trial was in violation of Due Process of Law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

7. That the repeated taking of Defendant Lisenba from jail without his attorney and against his consent and to the office of district attorney and other places and after prolonged questioning without food and without rest and thereafter extorting a purported confession which was used in the case against appellant was in violation of due process of law guaranteed by the fourteenth amendment to the Constitution of the United States.

That in accordance with the procedure and proceedings of the California Supreme Court the court entertained the petition for rehearing upon each of the grounds above specifically set forth, considered the same, and on November 3, 1939, within the time allowed by law, duly and regularly and explicitly overruled each of the contentions above made

by the appellant Major Raymond Lisenba that his rights under the Fourteenth Amendment to the Constitution of the United States were infringed, Justices Houser and Curtis dissenting, and voting for rehearing, on said [fols. 2588-2610] grounds, Carter, Justice, not participating, and our decision of November 3, 1939 denying the Appellant Major Raymond Lisenba rehearing is to be interpreted and considered as holding against the appellant's contention that his rights under the Fourteenth Amendment to the Constitution of the United States upon each of the grounds above set forth were violated.

That upon November 6, 1939 a petition for appeal to the Supreme Court of the United States from the judgment of this court having been duly and regularly presented, and good cause appearing therefore, the same was allowed.

It is ordered that this certificate be filed in this court and made a part of the record on appeal to the Supreme Court of the United States.

William H. Waste, Chief Justice of the Supreme Court of the State of California. (Seal.)

[fol. 2611] IN SUPREME COURT OF CALIFORNIA

Crim. No. 4068. In Bank

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

MAJOR RAYMOND LISENBA, Defendant and Appellant

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[fol. 2612] OPINION—March 21, 1939

By the Court:

In an indictment returned by the grand jury of Los Angeles county Major Raymond Lisenba (also known as Robert S. James and who will be referred to as the defendant), and one Charles H. Hope were jointly charged with the murder of Mary Emma James, defendant's wife. The alleged homicide was perpetrated on or about August 5, 1935, and remained undetected for a period of several

months. In fact, the indictment was not returned until May 6, 1936. Thereafter, the accomplice Hope entered a plea of guilty to the charge and at the time of defendant's trial was awaiting sentence. He has been since sentenced to life imprisonment. Hope was the principal witness for the prosecution upon the defendant's trial, at which trial it was the theory of the People that defendant, in league with Hope, had plotted and consummated the death of defendant's wife for the purpose of collecting and dividing the proceeds of certain insurance policies on her life. It was also the theory of the prosecution that the homicide was perpetrated in such manner as to give the appearance of accidental death not only to allay suspicion but in order to bring into operation the double indemnity provisions of the insurance policies. In this connection, the evidence of the prosecution tends to establish that the conspirators undertook to bring about the deceased's death by means of a deliberately inflicted poisonous rattlesnake bite on the under side of deceased's left foot (the assumption probably being that, if fatal, such bite or laceration would appear to have been incurred in or about the garden of her home) and that this ingenious method of destruction having proved ineffective the conspirators accomplished their objective by deliberately drowning the deceased in the bathtub of her home, whereupon her body was placed in the fish pond on the premises to further the "accidental" appearance of her demise. The methods assertedly employed to bring about the deceased's untimely death will hereinafter be more fully described upon a detailed recitation of certain of the evidence. Upon the conclusion of defendant's trial, a verdict was returned finding him guilty of murder in the first degree, without recommendation. This appeal is from the judgment imposing the extreme penalty and from the order denying a new trial. We turn now to a discussion of pertinent evidence in the case.

Viola and James Pemberton, husband and wife, when called by the prosecution testified, in substance, that they had accompanied the defendant to his home on the evening of August 5, 1935, where they were to take dinner with the deceased and defendant; that upon arrival there they failed to find the decedent in the house whereupon defendant procured flashlights and suggested a search of the grounds and garden; that the defendant went to the back and James Pemberton to the front of the premises, that as the witness

James Pemberton walked back through the shrubbery he saw the body of the deceased in and near the fish pond, with the upper part of the body and head (face down) sub-[fol. 2613] merged in the water; and that when the defendant was told of the gruesome discovery he cried and otherwise expressed his grief.

John P. Toohey, a deputy sheriff, testified that he, in company with another deputy and in response to a summons, appeared at the scene at approximately 8:30 p. m., at which time he saw the body of the deceased near the fish pond; that at the time the head was in the water, face up (the discoverers undoubtedly having previously moved it); that the water was approximately 14 inches in depth; and that the body was so placed that he could see that the left leg "was swelled and very blue."

A. L. Hutchinson, also a deputy sheriff, testified that when he arrived at the scene he "noticed a cut on her [deceased's] left toe, her big toe on the left foot"; that the flesh of her left leg "was very dark * * * and it was almost black between the ankle and the knee, very black"; that the "whole [left] leg was black and blue from the ankle up to the knee and on the inside of the leg" and was "some swollen."

Charles H. Hope, the defendant's confessed accomplice and who at the time was awaiting sentence upon his plea of guilty to the charge of murder, testified, as the state's principal witness, that he had known the defendant for approximately seven years; that when conversing with the defendant in the latter's barber shop in June, 1935, the defendant asked him if he had any knowledge of rattlesnakes, to which the witness answered in the negative; that the defendant thereupon stated that he had a friend who had a wife he wanted to kill and desired rattlesnakes for the purpose, adding that if he (Hope) would "get me some rattlesnakes, I will give you \$100" and "defray all expenses"; that subsequently he (Hope) bought three rattlesnakes in Long Beach and delivered them a few evenings later to the defendant at his home; that the snakes cost \$5 but the defendant paid him \$20 prior to their delivery; that the defendant then had him stay at his (defendant's) home for several days and while there had the witness go to town and have two boxes made for the snakes with sliding glass tops; that the boxes were approximately two feet long and nine inches high; that in July, 1935, he again

talked with the defendant at his barber shop at which time the defendant said his friend was dissatisfied with the snakes because they were not fighters and that fighters could be procured at the Ocean Park Snake Pit; that thereafter he went with the defendant to said snake pit where the defendant conversed with the attendant and said "that is the one I want"; that the following day the defendant sent him to purchase the snake so designated; that the purchase was made and the snake was delivered to the defendant; that he next saw the defendant on August 3, 1935, two days prior to the homicide, at which time the defendant said that the snake was no good and that he wanted some fighters; that he (the witness) thereupon went to "Snake Joe" at Pasadena and purchased two snakes which he delivered to the defendant; that the defendant said "his wife [the deceased] had \$5000 worth of insurance and he was going to collect it"; that he went to the defendant's home on August 4, 1935, the day preceding the homicide, at which time the defendant stated that the witness was in as deep as the defendant; that defendant had him bring one of the sliding glass top boxes containing a snake from the garage into the house; that he came in the back way to the kitchen at which time he observed the deceased in her nightgown strapped or tied to the kitchen table and with adhesive [fol. 2614] tape, previously purchased by the witness at the defendant's request, fastened over her eyes and mouth; that the defendant told him he got the deceased, who was then pregnant, on the table under a ruse that a doctor was coming to "perform some kind of an operation on her for pregnancy"; that while the deceased remained in this prostrate position the defendant put her left foot into the box containing the snake; that the witness then returned the box to the garage; that he later left in the defendant's car with the box containing the snakes and dead chickens, etc., which had fallen prey to the snakes in defendant's prior tests of their ability to destroy; that he then picked up his (the witness') wife at her place of employment and returned the snakes to "Snake Joe" from whom they had been procured; that he threw the boxes out along the road; that he returned to the defendant's home about 1:30 a. m., August 5, 1935, the day of the homicide; that the defendant then appeared to have been drinking and told the witness that the snakes were no good and that his wife was not even sick; that the defendant thereupon jumped up and

said, "I am going in and drown her"; that the witness stayed in the automobile; that the defendant came out about 4:00 p. m. and said, "That is that"; that at approximately 6:30 or 7:00 a. m., the defendant said the deceased had been dead since 4:00 a. m. and the house "cleaned up"; that defendant then asked him to "help me carry it" whereupon he accompanied the defendant into the house where he observed the deceased lying in the hall dead with her feet toward the bathroom; that the defendant took the upper part of deceased's body and the witness the lower part and carried her "towards the fish pond"; that the witness refused to put deceased in the fish pond as requested by the defendant but went instead to the automobile; that the defendant told him he would care for him "when I get this money"; and that some time later the defendant gave him \$100 and instructed him to "get out of town". The witness thereupon identified three persons in the courtroom as the three men from whom on separate occasions he had purchased the snakes as above mentioned. His story was not materially shaken on cross-examination.

Certain portions of Hope's testimony were corroborated by his wife who, among other things, testified that on August 3, 1935, she drove with Hope to a snake farm in Pasadena; that Hope took a box and went to the side of the barn where she saw him with "Snake Joe", whom she identified when he arose in court; that the following morning she drove with Hope to within a block of defendant's home and Hope left her there, the witness driving back to Los Angeles alone; that Hope picked her up at work about 2:00 p. m. of that day (August 4th) in the defendant's car; that there were boxes in the back of the car; that they again drove out to the snake farm in Pasadena; that Hope took a box and went inside, returning several minutes later with "Snake Joe"; that on the return trip Hope threw out two boxes with glass tops; that Hope left her after dinner and she did not see him again until the following morning (the morning of the homicide) when he appeared "white and jittery and had been drinking".

Additional corroboration of portions of Hope's story appears in the testimony of the three persons from whom he assertedly purchased the several snakes. Roland H. Kirby testified that early in July, 1935, Hope came to him and said he was interested in experimental work and inquired

if he had snakes "with fangs and poison"; that Hope pur-[fol. 2615] chased three snakes and the witness gave him a jar of crystallized rattlesnake venom.

Mike Allman, who operated a reptile show at Long Beach, testified that the defendant and Hope one day came to his snake pit; that they had been drinking and were noisy; that the defendant offered to bet that the witness had no poisonous snakes; that the following day Hope returned with a sliding glass top box and purchased a rattlesnake, stating that he had lost \$100 to the defendant in a poker game and the defendant had offered to bet him \$50 that the witness had no poisonous snakes; and that upon being assured that a certain snake was poisonous, Hope purchased it to recoup a part of his card loss to the defendant. On redirect examination the witness stated that some time later and after their arrest, he had identified and picked out the defendant and Hope from a crowd of persons.

Joe Houtenbrink, known as "Snake Joe", testified that he operated a snake farm in Pasadena; that Hope came there on August 3, 1935 (two days prior to the homicide) and purchased two Diamond Back or Crotalus Atrox rattlesnakes for which he paid \$3.00; that Hope said he had a friend and "he said he already bought some snakes from other places and they wasn't hot and he wanted a real hot one and he was told to come over to me to get the snakes, that I handled hot snakes"; that Hope explained he wanted the snakes to bite and kill a dog and thus win a bet; that Hope had a box with a glass cover or top for the snakes; that he saw Hope the following day about 3:00 p. m. (the day preceding the homicide) and that at that time he repurchased the snakes from him for half price. This testimony corroborates that of Hope and his wife.

[1] At this point in the trial argument arose between counsel over the prosecution's proposal to bring into court the two snakes purchased by Hope from the preceding witness and which the district attorney declared were "the actual snakes that were at the house that day". Defense counsel vigorously opposed their production in court but the objection was overruled. The two snakes were thereupon produced in court confined in boxes. Defense counsel then insisted that the record show that the courtroom was assertedly thrown into a state of excitement and consternation by the production of the two snakes. However, in

opposition to counsel's assertion, the record also discloses the statement of the trial judge that the decorum of the courtroom and the orderly conduct of the trial were not disturbed in any manner by the incident. Thereupon, "Snake Joe", still on the stand, identified the two snakes so produced as the two he had sold to Hope two days prior to deceased's death and had repurchased from him one day prior thereto. According to Hope's testimony, at least one of the two snakes so identified, was employed by defendant and him to inflict a poisonous bite on the deceased's left foot when it was pushed by the defendant into the box containing the reptile. In view of such identification of the snakes and their employment in the plan to bring about the death of deceased, we perceive no error in the trial court's ruling permitting the production of the snakes for the inspection of the jury. It is not uncommon upon a murder trial to offer in evidence as part of the *res gestae* the medium employed to bring about the violent or untimely death of the victim. In *People v. Bannon*, 59 Cal. App. 50, 56, it is stated that "As a general rule physical objects which constitute a part of the transaction, or which serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under [fol. 2616] judicial investigation." (See, also, *People v. Peete*, 54 Cal. App. 333, 348, and 8 Cal. Jur. 143, sec. 228.) Moreover, the production of the identical snakes tended to corroborate the testimony of prosecution witnesses and to otherwise support the case of the People. It might also be mentioned that if the production of the snakes in court caused the extreme state of excitation urged by the defense, it is difficult to appreciate why defense counsel at a later time in the trial and during the development of the case by the defense, again produced the snakes and thus risked a repetition of the situation of which complaint is here made.

Returning to our discussion of the evidence, we find that the witness Irving Sherman, called by the people, testified to the effect that his father was in the cabinet business and that Hope on July 28, 1935 (several days prior to the homicide) ordered and had made two boxes with sliding glass tops. This item of evidence lends some credence to portions of Hope's testimony as well as to that of other prosecution witnesses.

In support of Hope's testimony that he was with the defendant at his shop and at his home several times prior to the homicide, thus affording opportunity for the planning and carrying out of their scheme, there is the testimony of Lois Wright, the defendant's niece, that she had seen Hope at defendant's barber shop, where she worked, and also had seen him in July, 1935, at defendant's home.

Sam Grant, a barber in defendant's shop, also placed Hope there on many occasions in 1935.

Dr. A. F. Wagner, the autopsy surgeon, testified that he found a laceration on the surface of deceased's great left toe; that her left foot was considerably swollen and discolored, the swelling extending up to the hip; and that deceased's lungs contained a considerable amount of water. He gave as the cause of death, "drowning and an acute cellulitis [swelling] of the legs." Cellulitis, he testified, is "always due to an infection of some kind"; that cellulitis resulting from a bacterial infection would take from two or three days to a week to reach the extent it had in the deceased but that if caused by "animal poisons" it would progress "much faster". He elaborated to the extent of saying that animal poisons capable of producing cellulitis such as the deceased had would be "the venoms of insects and snakes, spiders, and so forth". He further testified that the cellulitis present in deceased was not of the bacteriological type but was of the "animal poison" type and "could have been" caused by the bite of a snake. In addition, he testified that he again had examined the deceased's body in May, 1936, following its disinterment when criminal proceedings appeared in order, and that he was of the opinion that the laceration on the deceased's toe was caused by a rattlesnake bite.

Dr. Gustave Boehme, who was present at the examination following deceased's disinterment, testified that he had made a special study of snakes and snakebites; that on deceased's great toe of the left foot he had discovered an "old laceration wound approximately a quarter of an inch in length" which could have been caused by a number of things, but, in his opinion, had been caused "by some venomous creature, probably a snake, and all the other findings on the leg were compatible with such a finding", adding that the single incision was such "as could be caused by a fang striking at an angle, perhaps". In his brief the

defendant concedes that this testimony is corroborative of Hope's story.

Mrs. Ethel Smith, another niece of the defendant, testified, among other things, that the defendant had sent a trunk to her home for storage and that certain rope shown [fol. 2617] to her was in the trunk. Charles Griffen, an investigator for the district attorney, testified that he found the rope in the trunk. The significance of the testimony of these two witnesses lies in the fact that Hope when on the stand had previously identified the rope as being similar to that with which the deceased had been tied to the table when her foot was placed in the box containing the snake.

In support of its claim that the motive underlying the deceased's untimely death was the collection of insurance moneys, the prosecution produced as a witness one Louis Berry, an insurance agent with the Mutual Life Insurance Company, who testified that he had been a customer at defendant's barber shop and had solicited him for life insurance; that defendant said he was not personally interested but knew a girl who might be interested in life insurance; that about two weeks later defendant inquired as to the cost of a \$5000, twenty or twenty-five year endowment policy on a girl 26 years of age, whose name he would not reveal; that defendant agreed to submit the matter to the prospect; that about one week later the defendant introduced the witness to the prospective client, Mary E. Busch, who later became the defendant's wife and for whose murder he now stands convicted; that on June 25, 1935, he delivered to her a \$5000 policy which named the defendant as beneficiary, that subsequently and on July 30th, he called on the defendant in response to the latter's telephone request and the defendant inquired as to the effect on the policy of a misrepresentation by the insured at the time of applying therefor that she was married, when, in fact, she was not (deceased and defendant had been living together at the time); that the defendant stated they were not married until July 19th, following the issuance of the policy; that he (the witness) checked the matter with the company and reported back to the defendant that the policy was not affected thereby; that one premium was paid on the policy; and that after the deceased's death the defendant inquired if the company would pay under the double indemnity provisions of the policy as a result of the accidental charac-

ter of her death. On cross-examination the witness testified that the defendant had procured other prospective clients for him.

Max Galatz, a representative of the Occidental Life Insurance Company, testified that late in May, 1935, he received two applications for insurance on the life of the deceased, one for a \$5000 policy and the other for a \$700 policy; that defendant was named beneficiary in both; that the defendant and deceased (contrary to the fact) said they were husband and wife at the time; that he told the defendant that he would have to have more insurance on his life than the deceased had on hers; that defendant said he had ample insurance in two or three companies but applied for a \$3000 policy on himself; that the policies were issued and delivered about June 12th; and that only one premium was paid by the defendant on each of said policies, including his own. On cross-examination, the witness stated that in litigation which followed on the policies after deceased's death the defendant claimed under the double indemnity provisions but later settled for \$3500, which amount (less than the face value of the policies) was paid to the defendant. Defendant's testimony given during the trial of such action was read into this record by the phonographic reporter, from which it appeared that the defendant met the deceased about March 1, 1935; that they began living together early in May, 1935; that defendant, unknown to the deceased, had arranged for a mock marriage inasmuch as he could not then legally marry deceased because of the pendency of an annulment proceeding growing out of a previous marriage; that they thereafter became legally married on July 19, 1935; and that the deceased was in "marvellous health" up to the time of her death. In connection with the two policies last above mentioned, the defendant two or three weeks prior to deceased's death likewise made inquiry as to the effect of the misrepresentation 'that the parties were married' at the time of making application therefor.

E. L. Taggart, an automobile salesman, testified that he met the defendant early in 1935 and that defendant then stated that he desired to buy a cheap car with the understanding that he could turn it in on a large Studebaker in a few months upon his receipt of \$10,000 from an "estate".

[2] Madge Reed testified, in substance, that she met the defendant in the Italian Village on July 10, 1935; that he stated he was visiting from Kansas and was staying with his sister; that the defendant became intoxicated and asked her to drive him home, which she did; that while she was at his home, a woman who identified herself as his wife (the deceased) came home unexpectedly from a convention; that the defendant telephoned her several times thereafter, including a call two days prior to the deceased's demise; that defendant visited her at her apartment on August 11th (six days after deceased had died) and stated that they were trying to frame him for his wife's death but that he would collect her insurance money, marry the witness and they would go north; that defendant stated in the event of his indictment he wanted to use the witness as a surprise witness and would give her \$2000 if she would testify that she had met the defendant and deceased five weeks previously; that on the morning of deceased's death the witness had seen ~~the deceased~~ on her porch and that deceased had then complained of ~~not~~ feeling well, making particular mention of a sore leg; that she (the witness) and defendant registered that night at a hotel and talked over his troubles and the asserted attempt to frame him; that defendant had her make notes on a card as to how he wanted her to testify (briefly outlined above), whereupon the witness identified the card on which she had written the notes and also the hotel register. She further testified that defendant gave her \$60 at that time and promised her \$2000 later.

We find no error in the rulings admitting and thereafter refusing to strike out the testimony of this witness. It tended in some degree to establish the motive advanced by the prosecution—collection of insurance money coupled with the purpose of marrying another woman. It also tends to disclose an effort on the defendant's part to establish an alibi in the event his foul deed came to light.

[3] At approximately this point in the trial the prosecution was about to offer in evidence a statement or confession made by the defendant in the early morning hours of May 3, 1936, in the office of the district attorney and in the presence of several persons. Preliminary to such offer, however, and upon objection thereto by the defendant, the people undertook to establish that the statement or confession was the free and voluntary act of the defendant,

uninfluenced by promises, threats or persuasions. Defendant, on the other hand, undertook to establish that the state-[fol. 2619] ment or confession was improperly extracted from him. As a result, much of the evidence on this phase of the case is highly conflicting, the defendant in many instances contradicting the people's showing. The conflict so created was resolved against the defendant by the trial court in the first instance upon its ruling admitting the statement or confession as the free and voluntary act of the defendant and by the jury in the second instance by its verdict finding him guilty as charged. However, in view of the vigorous presentation and argument of this point upon the present appeal, we feel justified in developing the matter at some length in order that the general state of the record in this respect may be known.

The defendant took the stand on voir dire in an effort to show the asserted involuntary character of the confession and testified that he had been constantly questioned, threatened and beaten by the officers from the time of his arrest on April 19th, without a warrant, until he was "booked" at the county jail on the 21st. He asserted that his ears were bruised and swollen and that he had suffered a hernia as a result of such manhandling. During this period he was assertedly proffered manslaughter punishment in exchange for a confession. His counsel testified that when he later saw the defendant in the county jail his ears were blue and swollen. Several depositions were offered by the defendant as tending to show that he was congenitally weak-minded and therefore more likely to capitulate to coercive methods than the average person.

It appears from the testimony adduced by the people that the defendant was placed under observation in April, 1936, for suspected incest involving his niece, at which time the authorities uncovered and developed the criminal character of deceased's death which had occurred several months prior thereto. As a result of these developments the defendant was arrested on April 19, 1936. He was not taken without delay before a magistrate nor was he immediately incarcerated in the county jail as required by sections 849 and 1597 of the Penal Code. Instead, and after some preliminary questioning in the office of the district attorney, he was taken by the officers to a private home, adjoining that where the defendant had been living with his niece,

and where admittedly he was held incommunicado for a period of about forty-eight hours, during all of which time he was admittedly subjected to incessant questioning by the officers who worked in shifts. The defendant was apparently deprived of rest and sleep during practically all of such period. At least, the prosecution failed to offer any positive testimony that defendant during this period was afforded an opportunity of going to bed, a privilege concededly enjoyed by the examining officers. In addition, one of the officers testified that during the questioning he became angered and "slapped" the defendant's face when the defendant was said to have referred to the deceased as a "whore." Other than subjecting defendant to constant questioning, and the "slap" administered to him, the several officers categorically denied that any threats or promises were made to or any physical beatings were inflicted upon the defendant during the two day period he was being held and questioned in the private house. Charles Griffen, the assistant chief of the bureau of investigation in the office of the district attorney, while admitting the continuous course of questioning of the defendant during this period, testified that other than the slap mentioned [fol. 2620], no force or violence was employed on the defendant; that the defendant was calm and collected; and that he appeared unafraid and answered questions (other than admitting the crime) readily and rationally.

Everett Davis, another investigator for the district attorney, denied that the defendant was offered a lighter punishment if he would confess and testified that the defendant was told no one could offer or promise him anything but if he wanted to tell the story they would listen. He added that of his own knowledge, the defendant slept from 3:30 to 8:00 a. m., April 21st, in a chair with his feet on a second chair. Two other officers likewise denied defendant's statement of threats and violence during the period April 19th to 21st, one of whom testified that defendant explained receiving the hernia in an automobile accident. Three deputy sheriffs, who saw the defendant (stripped and otherwise) in the county jail on and subsequent to April 21st testified, in substance, that they saw no bruises, marks or discolorations on defendant's body or head and that he made no complaints as to his treatment or condition.

It is apparent, therefore, that the evidence is sharply

conflicting on this phase of the case, other than that showing continued questioning of the defendant throughout the period of April 19th to 21st, during which an ill-advised slap was administered to him, and for all present purposes the conflicts therein must be presumed to have been resolved against the defendant by both the trial court and the jury.

Regardless of the impropriety of holding and continuously examining the defendant for many hours in a place other than a county jail prior to the filing of any charge against him, a course which we expressly disapprove, it is of the utmost significance that a confession was neither obtained nor extracted from the defendant during such period. The record definitely discloses that this treatment of which defendant here complains failed of its asserted objective. In other words, no matter how improper the treatment of defendant between April 19th and 21st, a confession did not result therefrom. It was not until May 3, 1936, twelve days later, that the confession sought to be introduced was obtained. In this respect, the evidence shows that the defendant was removed from the private house where he had been held and booked at the county jail on April 21st. One of his counsel took the stand and testified that he saw the defendant in the county jail on April 25th, at which time he instructed the defendant not to answer any questions in his absence. On cross-examination, said counsel admitted that he saw the defendant "when he was arraigned" on April 21, 1936. It is apparent, therefore, that the defendant was not held incommunicado when the confession was forthcoming. He had enjoyed the benefit and association of counsel and had been before the grand jury and the court. It is also of the utmost importance that the defendant did not confess until after Hope, his accomplice, had been arrested on May 1st and had told the story to the officers in charge of the investigation. The defendant's confession followed within two days thereafter. Defendant testified further on voir dire, however, that he still suffered from the pain and memory of the prior beatings assertedly administered to him; that he was afraid to follow the advice of his counsel and continue to refuse to answer questions or to deny the statements of the officers as to the [fol. 2621] manner of the commission of the homicide; that the officers accused him of lying and threatened to take him

back to the house and "beat your God damned head off"; that he could not take another beating and therefore offered to "gladly admit it [Hope's story] and save myself other punishment". On cross-examination, he admitted that he did not confess following the alleged beatings administered to him by the officers during his confinement in the private house from April 19th to 21st and he also admitted that no threats, promises or beatings preceded his statement and confession in the district attorney's office on May 2nd and 3rd.

Chronologically, the circumstances leading up to the confession were narrated by certain of the officers, as follows: Williard L. Killion, a deputy sheriff, testified that on the morning of May 2nd, he took the defendant from his cell in the county jail to the Chaplain's room; that many persons were there; that no one made any promises or exerted any coercive influence to induce the defendant to talk; that an unsuccessful effort was made to locate defendant's counsel, as requested by him; that all statements thereafter made by the defendant were free and voluntary and without objection on his part that his counsel was not there; and that Hope was brought into the room.

Edward F. Lynch, who reported the proceedings at this meeting, testified that deputy district attorney Williams related Hope's story to the defendant and asked the defendant if he had anything to add thereto and the defendant replied "Nothing". This session ended at 11:50 a. m. on May 2, 1936, whereupon the defendant was returned to his cell. Later in the day and pursuant to court order, he was taken to the scene of the homicide by a deputy sheriff. Still later, he was returned to the office of the district attorney where he answered questions in the presence of several persons. Robert P. Stewart, the chief deputy district attorney, testified that the district attorney principally examined the defendant during the afternoon of May 2d; that Hope was brought in during the session; that no promises or other improper influences were exerted over the defendant; and that defendant was rational and coherent at all times. Along about midnight the defendant was taken out to a restaurant by Killion, the deputy sheriff, and two others. While in the restaurant, the defendant, according to Killion's testimony, voluntarily unburdened himself as to the commission of the crime. In this narrative the de-

fendant told of plotting with Hope to kill the deceased and to collect and share her insurance money. However, throughout his statement of the circumstances surrounding the commission of the crime, the defendant charged that Hope was the principal actor in the consummation of the crime. It was Hope, he said, who placed the deceased's foot in the box for the snake to bite and who later drowned deceased in the bathtub and placed her body in the fish pond. The defendant during this statement also admitted that he had had the deceased write a letter to her sister complaining of a sore foot and leg, which letter was found, unmailed, in the deceased's home on the evening of her death by the Pembertons and the defendant immediately after they had discovered her lifeless body. This letter was offered in evidence by the prosecution and there is evidence, conceded in the defendant's brief, that it was not in the deceased's normal handwriting. The inference was available to the jury that the defendant had compelled its writing, a fact later admitted by him in his confession, to furnish, if [fol. 2622] possible, an alibi.

At the conclusion of this restaurant statement, the defendant was returned to the office of the district attorney where, between the hours of 1:30 and 3:30 a.m. May 3, 1936, according to the testimony of several there present, the defendant freely and voluntarily detailed the circumstances of the crime in a confession which the prosecution thereupon offered and had admitted in evidence.

It cannot be said, under all of the evidence, that the court below erred in admitting the defendant's reply to the accusatory statement and his confession as free and voluntary acts on his part. It is declared in *People v. Lehw*, 209 Cal. 336, 341, that "Whether a confession is free and voluntary is a preliminary question addressed to the trial court, and a considerable measure of discretion must be allowed that court in determining it. * * * In *People v. Siemsen*, supra, 194 Cal. 595, it is declared that the 'admissibility of such evidence so largely depends upon the special circumstances connected with the confession, that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed, in the first instance, to the [trial] judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forborne to mark with absolute precision the limits of admission and exclusion.' The

mere fact that the confession was made to a police or other officer of the law while the accused was under arrest, does not necessarily render the confession involuntary and inadmissible. So, also, the mere fact that a confession is made in answer to questions will not authorize its rejection, though the fact of its having been so obtained may be an important element in determining whether the answers were voluntary. * * * A reviewing court cannot say that the trial court committed error in admitting a confession of guilt unless such error appears as a matter of law from the record presented. The trial court is clothed with considerable discretion in determining whether or not the confession was free and voluntary, and where the evidence is conflicting on the subject, it must be assumed that the testimony concerning a defendant's admission was properly admitted."

In the present case the testimony is overwhelming to the effect that during May 2nd and May 3rd, when the statement and confession were made, no promises, immunities, threats or forms of violence were employed to overcome the free will of the defendant. This is corroborated by defendant's own testimony. That he was questioned for many hours is not, of itself, improper, particularly when, as testified, he freely responded thereto. Some recognition must be given to the practical problems presented in the work of crime detection. A reasonable conclusion, and one which the trial court and jury might have readily reached on all the evidence, is that the defendant broke down and confessed his participation in the crime only after his confederate and accomplice had been arrested and detailed the murder conspiracy and had been brought face to face with the defendant who had been informed of the details of his confederate's story. Each case must turn on its own facts and we therefore give but passing mention to the authorities relied on by the defendant.

[4] Turning our attention now to the substance of the confession, and eliminating many unnecessary details, we find defendant relating that early in July, while the deceased was away for a few days at a convention, he and Hope planned to kill her and to share equally in the proceeds of [fol. 2623] her insurance policies; that Hope first suggested a false hold-up in which deceased would be shot, but they later agreed on Hope's second suggestion of permitting a rattlesnake to bite her in the hope that the infection would

prove fatal; that he gave Hope \$20 and the latter had "certain kinds of boxes made" and brought snakes up to defendant's home in them; that Hope brought three the first time and two the second, all of which proved unsatisfactory upon experimentation with chickens, rabbits, etc.; that two days before the deceased's death he gave Hope \$6 to purchase two "hot" snakes Hope had reported seeing; that these snakes were procured and kept in boxes in his garage over Saturday night (Aug. 3, 1935); that the conspirators did some drinking with deceased that night and discussed an abortion which it was claimed she desired and believed that Hope, as an asserted medical student, was to perform the following day; that Hope left and returned the next morning about 11:00; that he gave Hope all the money he had, about \$100, and left about 1:00 p.m. because deceased "had been too good to me and I just couldn't have anything to do with that part of it."; that Hope said deceased would die in about one hour; that he (defendant) returned about 4:00 p.m. and found Hope intoxicated and that Hope had deceased "full of liquor"; that Hope told him he had put her foot in the box containing a snake; that Hope left and returned at 6:00 a.m., Monday, August 5, 1935; that he suggested calling it off but Hope said they had gone too far to stop; that at Hope's suggestion he left for his barber shop with the understanding that Hope would "care" for the deceased, who was still alive, by burning the "house up"; that Hope came to the shop about 1:00 p.m. and reported that he had not burned the house but had thrown deceased "in the bath tub and drowned her" and then placed her body in the fish pond; that he upbraided Hope for "the worst thing you could have done" because he [defendant] "had a wife drown in a bath tub in Colorado Springs a little while ago"; that he told Hope "there ain't enough men in the District Attorney's office to make me talk", adding "and there wasn't if he [Hope] had not told it"; that he then arranged to have the Pembertons, who were innocent of the situation and whose testimony is related above, go home with him; that when he left for his shop on Monday morning he did so with the idea that deceased "was to be murdered by Hope" and they were to share equally in the proceeds of her insurance; that the snakes were purchased for that purpose and deceased, as a ruse, was informed a desired abortion was to be performed; that after deceased's burial and while intoxicated, he may

have offered the Reed woman a \$1,000 to say she saw deceased alive in her yard on the day of her death; that the letter above referred to was written by deceased while intoxicated and under his direction; and that his statements were "the true stuff" and made freely and voluntarily. During this session, Hope was brought in to the room and confronted the defendant.

With the foregoing evidence before it the jury had ample support for its verdict. In his confession the defendant admitted his participation in the death of deceased, though he again undertook to point to his accomplice as the principal actor. Under settled principles, this would not, however, serve to relieve him from full responsibility for the homicide which he and his accomplice planned and perpetrated. [fol. 2624]

[5] In addition to the evidence above narrated, and as tending to prove that the death of deceased was not the result of accident, as it at first appeared, but was deliberately planned and executed in order to collect insurance money payable on the death of the victim, the prosecution offered evidence tending to show that a former wife of the defendant, equally heavily insured in favor of the defendant, while recovering from serious injuries incurred in an automobile accident in 1932, which the defendant survived with but little inconvenience, was likewise found drowned in the bathtub of their home with resulting monetary benefit to the defendant. In making the offer of proof in the absence of the jury, the district attorney stated that he would adduce evidence tending to show that the defendant struck his former wife on the head with a blunt instrument and then ran the automobile in which they were riding off the Pike's Peak Highway and the victim not having died from the injuries so incurred was later and while recuperating, drowned in the bathtub. This evidence, hereinafter briefly narrated, in our opinion, was sufficient, *prima facie*, to indicate that defendant had been a party to the death of a former wife under somewhat similar circumstances and it was apparently offered and admitted as tending to show common plan or scheme in the execution of two homicides and an absence of accident in the deceased's untimely demise. Defendant unsuccessfully objected to the admission of this evidence on the ground that it would fail to establish any of the elements of the offense for which he was on trial and would serve only to prejudice him before the jury.

In support of its offer of proof the prosecution produced several witnesses. The first, J. D. Rogers, superintendent of the Pike's Peak Highway, testified that he first saw the defendant about 7:00 p.m., September 21, 1932, at Glenn Cove, Colorado, where the defendant reported that he had been in an automobile accident; that defendant's clothes were "neat" and not soiled or disarranged; that he drove the defendant back to the scene of the accident, the defendant stating that he "really don't know how it happened" as his (former) wife had been driving coming down the mountain while he was looking across the valley with field glasses; that defendant said the car suddenly left the road and that he (defendant) jumped from the car after it had travelled about fifty feet down the mountainside; that the car came to rest against a large boulder one hundred and fifty feet below the road; that he (the witness) found the deceased lying on the right hand side of the car (though she was supposed to be driving on the left side) with her head down hill and her feet on the running board of the car; that her clothes were free of dirt; that the car rested on its wheels; that there was considerable blood inside the car, especially on the back of the cushion on the right side and on the floor boards; that a hammer on the floor of the car was covered with blood; that he smelled liquor from the deceased and felt a softness behind her ear when he lifted her; that there were foot prints back about eighty feet where the car left the road and on either side of the tire marks, some pointing to where the car went off the road; that the defendant's car was the last one to come down the mountain that particular evening, all others having checked out ahead; and that the defendant appeared quite calm.

Miss Grace Yarnell, a cousin of this former wife of the [fol. 2625] defendant, testified that she had visited the injured woman while she was recuperating in the hospital, which covered the period from September 21 to October 8, 1932; that she saw the injuries over her cousin's right eye and back of her ear; that after October 8th she saw the injured person in a cottage in Manitou Springs, Colorado, where defendant had moved her prior to complete recovery; and that defendant had told her he was thrown free of the car and had lifted his (former) wife from the car and placed her on the ground with blankets about her.

Gerald Rogers testified that he worked in the local grocery store in Manitou Springs; that defendant came to the store

about 5 p.m. on October 14, 1932, ordered some groceries and asked that they be delivered; that defendant then said that he would ride home with the witness; that he (the witness) went into the kitchen and the defendant went into the bedroom and then to the bathroom; that defendant then called him and he saw defendant's wife lying on her back in a half-filled tub of lukewarm water. On cross-examination, it appeared that the defendant had ridden home with him on prior occasions.

Dr. George B. Gilmore testified that he was coroner in 1932; that he saw defendant's (former) wife on October 14, 1932; that she was then on a bed and dead; that defendant said he had been away from home for several hours at the time of her death; that the defendant related that the doctors in the hospital had theretofore warned deceased against washing her hair because of her head injuries but that she apparently had undertaken it in his absence and drowned as a result; and that he (the witness) suggested an autopsy but defendant opposed it, saying he "couldn't permit anything of that sort." The doctor then identified certain letters subsequently addressed to him by the defendant requesting a change in the death certificate in order to show that the drowning was attributable to the injuries received in the earlier automobile accident (apparently to facilitate collection under the accidental and double indemnity provisions of the insurance policies.)

Mrs. Irene F. Snyder, bookkeeper at the hospital, testified that defendant's former wife was there confined from September 21 to October 8, 1932, and that the defendant had stated at the time that he was without funds to pay the bill but intended negotiating a loan on an insurance policy. There is other evidence that defendant was financially embarrassed and had borrowed money about this time.

The prosecution produced Doctor Decker, concededly qualified to express medical opinions, and who examined and interpreted certain x-ray photographs theretofore taken in the Colorado hospital, who testified that, in his opinion, the defendant's former wife suffered fractures of the skull from two blows, one on the side and the other on the front of the head; that the fractures had been caused by a hard, moving object being projected against the head and not by the head being projected against a hard, stationary object; and that the blow on the side of the head had

been received first. That this evidence tends to support the prosecution's theory of a felonious assault on defendant's former wife must be admitted and defendant concedes in his brief that it was for the jury to weigh this evidence as against his conflicting medical testimony touching the same subject.

John A. McKelvey testified that when defendant pur-[fol. 2626] chased a car from him in 1932, he stated that his previous car had been wrecked when the steering knuckle broke and the car went off the Pike's Peak road as he was driving.

C. A. Pries, who was with the Prudential Life Insurance Company in 1932, testified that the defendant at that time told him he had an insurance prospect for him; that he later met Miss Winona Wallace (who subsequently became defendant's wife and, as shown, was found drowned in the bathtub of their Colorado home) at defendant's apartment; that defendant said he wanted a \$5,000 policy on himself and a similar policy on the lady; that the defendant asked if he could be named beneficiary in the latter policy and was informed that this was not possible until the parties were married; that the two policies were later delivered, the defendant being named beneficiary in the lady's policy; that upon the death of the lady (who as stated, had prior to death married defendant) the defendant asked for double indemnity payment under the policy; and that the defendant only carried his own policy for three months. The witness thereupon identified a check sent later to the defendant in payment of his claim under the policy.

Bayard Judd, who was with the Kansas City Life Insurance Company, testified that just prior to the death of Winona Wallace James (defendant's former wife), she and defendant had sought an immediate loan on that company's policy covering her life.

We find no error in the trial court's admission of this evidence touching the Colorado incident involving the death of a prior wife of the defendant under circumstances similar in many respects to the circumstances surrounding the death of the deceased for which he was on trial. In each instance the defendant had placed his asserted victim in touch with insurance agents with a view to and ultimate procurement of life insurance on her. In each instance defendant inquired whether he might be named beneficiary when the parties were not married. In each instance he

received a negative reply and thereafter married the asserted victim. In each instance a policy or policies were issued naming him as beneficiary. In each instance the insured was shortly thereafter found drowned in or near the home she occupied with the defendant under circumstances having an appearance of accident but upon full and close inspection tending strongly to indicate foul play. In each instance the defendant claimed under the accidental, double indemnity provisions of the policy or policies and, in each instance, ultimately profited financially by the collection of his wife's insurance.

In view of these many similar and unusual circumstances, we are of the view that the evidence of the Colorado incident was admissible not to prejudice the defendant by proof of the prior commission of another crime but as tending to establish that the death of the deceased in the present action was not accidental, as it might at first appear, and as claimed by the defendant, but was the result of a general plan or scheme on the defendant's part to insure, marry and murder his victims in order that he might thereby profit financially. In its instructions to the jury, several of which were requested by the defendant, the court below properly limited the purpose for which it might consider this evidence. That evidence of prior similar acts and crimes is admissible for the purposes already mentioned, is now well established. (*People v. Stutsman*, 66 Cal. App. 134; *People v. Barnes*, 111 Cal. App. 605; *People v. Morani*, 196 Cal. 154, 160; *Holt v. U. S.*, 42 Fed. Rep. [2d] 103, 106-107; *People [fol. 2627] v. Gosden*, 6 Cal. [2d] 14, 24. See, also, the English "bathtub" murder case, *R. v. George Joseph Smith*, 21 Crim. App. Rep. 229, 236.)

The *Morani* case, *supra*, contains the following: " 'In the case of *People v. Seaman*, 107 Mich. 348, 61 Am. St. Rep. 396, 65 N. W. 203, it is said: 'Upon principle and authority it is clear that where a felonious intent is an essential ingredient of the crime charged, and the act done is claimed to have been innocently or accidentally done, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result as tending to show guilty knowledge, and the intent or purpose with which the particular act was done and to rebut the presumption that might otherwise obtain.' " " "

It is stated in the Holt case, *supra*, that "No good purpose would be served by a review of the myriad of cases where evidence of other and collateral transactions has been admitted to prove the *quo animo*, *scienter*, motive, or intent of the defendant in the doing of a particular act; nor in restating the circumstances under which such evidence may strongly tend to support the charge made. Many of the authorities would be inapplicable to the present case, for there the evidence was introduced to show knowledge, while here its purpose is to negative the claim of accident and the alleged innocent motive, injected into the case by the defendant himself. It is sufficient to say that from the earliest times the propriety of admitting evidence for the purpose here stated has been fully recognized. * * *

"When introduced to show intent, or repel the possibility of accident or mistake, the time of occurrence of the collateral circumstance is immaterial. Such duplication of the same situation is just as abnormal after the time laid in the indictment as before. Accordingly it is held that evidence of the collateral circumstance after as well as before the alleged commission of the crime may be admitted. * * * The courts generally use the phrase 'at or about the same time,' but it is clear, we think, that the length of the separating interval, and the fact that evidence of but one other similar instance was before proved, go only to the weight of the evidence, not to its admissibility. * * * In each case the question is, and of necessity must be, whether the evidence tendered has probative effect, logically and under the doctrine of chances. If it has, and we think such is the case here, it should not be excluded simply because it also shows the commission of another crime. This last fact is immaterial."

In the Gosden case, *supra*, the evidence tended to show that approximately six years prior to the death of his wife for which defendant was then on trial, a former wife of the defendant came to an untimely death under somewhat similar circumstances. We there declared that "Turning now to the questions of law raised by appellant, the first contention made is that the trial court erred in admitting evidence of the death of appellant's former wife, Vivian Taylor Gosden. It is not necessary to repeat the evidence to show the similarity of the circumstances surrounding the deaths of appellant's two wives. This evidence tended to show that each died of strychnine poisoning, each was in-

sured with the appellant as the beneficiary, and in each case the appellant attempted immediately upon the death of the wife to collect the insurance upon her life. The evidence as to the death of the first wife and the fact that her life was insured with the appellant as beneficiary was properly admitted to show the motive of appellant in the murder of his second wife. (*People v. Northcott*, 209 Cal. 639, 652, 289, Pac. 634, 70 A. L. R. 806.)"

[6] Nor do we think that in the present case the prosecution was required, as urged by defendant, to prove the elements of the asserted Colorado crime beyond all reasonable doubt, as would be the case were the defendant standing trial for such asserted earlier offense. In this connection it is declared in *Lund v. State*, 190 N. E. (Ind.) 850, 853, that "It is only the ultimate material facts to which the rule of reasonable doubt applies. The facts regarding the other transactions were simply evidentiary facts introduced for the purpose of being considered, together with all of the other evidence in the case, upon the question of criminal knowledge and intent; and though the jury may have entertained some reasonable doubt as to some of the other transactions, or some of the other items of evidence, which tend to prove guilty knowledge or intent, if, notwithstanding that fact, and having considered the evidentiary facts, doubtful and otherwise, they were convinced beyond a reasonable doubt of the ultimate fact of guilty knowledge and intent, it is sufficient."

In 1914, Ohio adopted a contrary rule when in the case of *Baxter v. State*, 110 N. E. 456, to which the defendant refers us, it was declared that "Evidence that an accused was guilty of other similar offenses must be such that a jury would be authorized to find him guilty of these offenses." However, defendant has failed to note that in the later case of *Scott v. State*, 141 N. E. 19, 26, the Ohio court renounced the rule of the *Baxter* case, declaring: "Is the rule in the *Baxter* case based upon sound reason? It has long been the general rule that a conviction is warranted if on the whole evidence the jury is satisfied beyond a reasonable doubt that every material element charged in the crime exists and that the defendant is guilty of the crime charged. In other words, it is the holding that the state need not establish each particular fact of the case beyond a reasonable doubt, if it establishes beyond a reasonable doubt the existence of every material fact alleged in the indictment

and the guilt of the defendant. * * * If testimony with regard to other similar crimes is to be dealt with as other evidence, it falls under this general rule and need not be discarded simply because particular items tending to prove other similar offenses are not established beyond a reasonable doubt, so long as the jury, from the whole testimony, are convinced to a moral certainty of the guilt of the defendant of the crime charged and of the existence of every material element necessary to establish that guilt.

"That this common sense view of the situation obtains in certain other American Jurisdictions is shown by the fact that while the case of *Baxter v. State*, supra, is the leading case which lays down the doctrine here discussed, it is by no means universally followed in its exact terms. While the *Baxter Case* is frequently cited, the degree of proof required in this class of testimony is held on excellent authority to be positive or substantial, but not 'beyond a reasonable doubt.' "

In effect, we recently held in *People v. Thorne*, 10 Cal. (2d) 705, 708, that evidence which merely tends to show an attempt to commit or the commission of other offenses is admissible to prove common scheme or plan even though it falls short of proving the corpus delicti of such other offenses. In so concluding, we quoted from *People v. White* [fol. 2629] side, 58 Cal. App. 33, 38-41, to the effect that "If viewed with respect to its relevancy as tending to show that the facts constituting the charge contained in the information were a part of a scheme to defraud the public as distinguished from a single individual, it was not necessary in order that *Stivers'* testimony be admissible that an attempt be shown to have been made to sell him any stock or that the evidence, if accepted as true, should tend to show the commission of an offense like in character to the one charged. * * *

We also there quoted from *People v. Sindici*, 54 Cal. App. 193, 196, to the effect that "Where the very doing of the act charged is in issue [as here] and is to be evidenced, one of the essential facts admissible is the person's plan or design to do the act. This plan or design itself may be evidenced by his conduct, and such conduct may consist of other similar acts so connected as to indicate a common purpose including in its scope the act charged. * * *

In *People v. Baker*, 92 Cal. App. Dec. 370, 372, it is declared in part that "It is not essential that such similar

transactions shall have resulted in the commission of a crime. It is sufficient if they tend to prove a scheme of the defendant which included the acts charged."

In view of what has been said we are of the opinion that upon its offer of proof of the prior and in many respects similar Colorado incident, the prosecution made a substantial showing tending to prove that on that occasion (as well as on the one here under review) the defendant had financially benefited by the untimely drowning at home of his wife on whom, as here, he had previously procured insurance in which, as here, he was named beneficiary. Upon this substantial offer, later supported by the proof above narrated, the court below correctly admitted the evidence touching the prior incident in order that the jury in its weighing of the entire evidence might determine whether it tended to show a common plan or scheme on the defendant's part or tended to overcome the asserted element of accident involved in the death of the subsequent wife, for which death he was then on trial.

But, even if we assume, as defendant would have us do, that the authorities require the asserted prior Colorado homicide to be proved beyond all reasonable doubt, no prejudice could have resulted to the defendant from the admission of the evidence for the court below, concluding that the rule as is now being assumed, instructed the jury that it must believe beyond all reasonable doubt that defendant's former wife was murdered before it could consider the facts of that transaction in connection with the case at bar. It is to be assumed that the jury abided by the instructions given by the court.

In an effort to show that the deceased was alive on Monday morning, August 5th, when according to Hope's story she was dead, defendant produced a neighbor who testified that when he was in his yard at 9:25 a. m. on said morning he saw a mature, blonde woman, approximately five feet eight inches tall, wearing a rust colored smock, in the defendant's yard; that he had seen a woman in the yard on previous occasions but could not say it was the same one; and that he had never met the deceased nor had she been pointed out to him. Even if it be conceded that the person so described by the witness bore a resemblance to the deceased, the matter was one for the jury to resolve along with all other conflicts in the evidence.

The defendant's sister testified that she visited with him [fol. 2630] and the deceased early in July, 1935, and saw Hope there on several occasions; that she heard the deceased state she desired an abortion whereupon the defendant said Hope would "take care of her". The witness also testified that during 1933-34 the defendant had loaned her several hundred dollars. This evidence was apparently offered for the purpose of overcoming the prosecution's showing that defendant was financially embarrassed and in need of the deceased's insurance moneys.

Defendant also called one of the barbers in his shop who testified he saw the defendant on August 5, 1935 (after the killing but prior to the finding of deceased's body) and that he appeared normal, was not intoxicated and did not exude an odor of liquor. This testimony obviously was intended to rebut portions of Hope's testimony, particularly that part to the effect that during and immediately following the commission of the homicide he and the defendant had imbibed rather freely of liquor.

The defendant also produced a naturalist who expressed his views as to the habits of snakes, their average life when held in captivity and the effect of snake bite upon human beings.

The defendant took the stand in his own defense and denied Hope's story that they had planned to murder, and had murdered, the deceased, by means of rattlesnake infection, drowning, or otherwise. He did testify, however, that Hope came to his home on July 3, 1935, in an intoxicated condition and expressed a desire to stay; that he told Hope to return sober the following day; that Hope, at the time, had with him a box of rattlesnake venom (which tends to corroborate portions of the prosecution's testimony to the effect that Hope was at the defendant's home and possessed reptile venom); that on July 6th, Hope came to his barber shop and again asked leave to stay at defendant's home; that he gave Hope the key and he came that night and stayed several days; that he introduced Hope to the deceased, his sister and his niece as "Dr. Smith"; that at one of the breakfasts the parties discussed the pregnancy of the deceased and deceased during the course of the conversation stated that she could not go through with the ordeal of childbirth and that "Dr. Hope will take care of me" (though earlier defendant had testified he introduced Hope as "Dr.

Smith"); that he saw Hope again on August 3rd (which corroborates Hope's story of being with defendant two days prior to the homicide) but that Hope did not deliver any rattlesnakes to him; that Hope came to his home on August 4th (the day prior to the homicide) to abort the deceased (again corroborating Hope as to being at defendant's home at that time); that he did not approve of an abortion and left home while Hope "cared" for deceased; that Hope left about 1:00 p. m. of that day and he did not see him again between that time and the time of the asserted drowning of deceased the following morning; that while he aided the deceased in taking out insurance on her life he did not do so with any thought of thereafter murdering her and collecting the same; that he did not cause the deceased to write the unmailed letter to her sister, found in the house and referred to above, but in his "confession" had admitted so doing because one of the officers required it; and that on the day before her death the deceased stated to him that she had cut her foot on a tin can while walking barefooted in the yard (this apparently to explain the laceration on her foot which the prosecution contended was inflicted by the fang of a rattlesnake.) On cross-examination the district [fol. 2631] attorney confronted the defendant with his inconsistent statements made to the police on August 7th, two days after deceased's demise, and several months prior to his arrest therefor, to the effect that she had not mentioned a cut or swollen foot to him. Inconsistencies between his testimony and prior statements to friends as to the movements of deceased and himself on Sunday, the day preceding her death, appear in the evidence. In rebuttal of his testimony that he opposed the abortion which deceased assertedly desired, the prosecution recalled Mrs. Pemberton, the friend who was with her husband and defendant when the body was found, whereupon she testified that a few days before the deceased's death the defendant told her (the witness) that deceased was "crazy to have a baby, but I don't want one". We will not undertake to set out additional inconsistencies in statements of the defendant. These were matters for the jury to determine in its consideration and evaluation of the entire evidence. The jury was fully instructed on the law and no complaint is here made of any of the instructions.

The entire record has been examined and all contentions advanced have been considered. Reference to other items

of evidence not here mentioned would neither add to nor detract from the conclusion here reached. Sufficient has been said to illustrate that the verdict finds ample support in the evidence and that the judgment entered thereon should remain undisturbed.

The judgment and order are, and each is, affirmed.

For the reason that Mr. Justice Houser was not present at the time when the argument was heard in this case, he does not participate in the decision thereon.

Mr. Justice Nourse sitting pro tempore.

DISSENTING OPINION

I dissent. The Court opinion is so deficient in its statement of the facts to which it refers in general and sweeping terms as supporting its conclusion that it becomes necessary to set forth much of the evidence which was adduced in the case in order to appreciate the kind of evidence, with all of its weird absurdities and vagaries, which must be given verity in order that the judgment in the case may stand. This case makes it singularly appropriate that the familiar rules which cannot be ignored in the consideration of criminal cases be re-stated. A few of these cardinal principles are: that suspicion, however strong, will not justify a conviction of crime; that probabilities alone are not sufficient to sustain a conviction; that a person may not be convicted upon the doctrine of chances, that is to say, that the chances are greater that he is guilty than that he is innocent; that the proof of guilt must be of the character and quality which convinces the mind beyond all reasonable doubt and to a moral certainty of the guilt of the accused; that "a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof. * * *" (Sec. 1111, Penal Code.) Lastly, the evidence must be reasonable and substantial and not of a haphazard or irrational type, or rendered inherently improbable or doubtful by its own unreasonableness. It must bear the stamp of sincerity and truthfulness, rather than bear the impress of fabrication. [fol. 2632] This case presents a perfect illustration of the dangers and abuses which result from a failure in the trial

of criminal cases to adhere to the age old rules and maxims of criminal jurisprudence, which are cherished next only to the Magna Charta as safeguards of life and liberty when either is placed in jeopardy by an accusatory process. At least six major issues, including two entirely different alleged attempts to take life by different methods, were injected into the case, which no doubt greatly influenced the jury against the defendant in the consideration of the evidence relevant only to the commission of the crime charged in the indictment. This evidence no doubt created such strong prejudice against the defendant that it is extremely questionable that the jury was able to withstand its influence and calmly and dispassionately weigh the credibility of the witnesses by the application of "the rule of reasonableness", or to observe the presumptions and inferences with which the law clothes all persons charged with the commission of a public offense. Other errors which we deem equally as prejudicial to the rights of the defendant as those above mentioned will receive the attention which their importance merits.

Some twenty years prior to his indictment, defendant adopted the name of Robert S. James, and we will refer to him by the name of his adoption. For a period of fifteen years he conducted a barber shop in the city of Los Angeles, in the name of James, and he was known solely in his business transactions and to his friends and acquaintances by the name of Bob or Robert S. James. He is a native of the state of Alabama, and was a member of a large family consisting of a mother, brother and several sisters. Numerous collateral relatives on both sides of the parental tree constituted the gentry with whom he spent his early boyhood days, in hard circumstances of poverty, in a rural community. His father, who was an itinerant watch and clock repairer, latterly drew apart from the mother and the children, and the latter, being left in the mother's care, were compelled by force of circumstances, in every instance, to leave their home at early ages and find employment in order to maintain themselves and the household. The defendant's school advantages were very scant. At an early age he worked in cotton mills, a coal mine, and, finally, with the assistance of relatives, he was enabled to attend a school conducted for the preparation of young men who planned to engage in the barbering business. He followed this trade—except for the time he spent in the service during the

World War—from early manhood to the time he was formally charged with the murder of his wife, Mary Emma James, on May 6, 1936, at the city of Los Angeles where he conducted the usually appointed barbershop, consisting of three or four chairs, with a beautysshop stall or apartment, located at 522 West 8th street, a business district in said city. His patrons consisted of persons engaged in business in the area in which his shop was located, and the general public desiring the services of a barber. Among his patrons were several life insurance agents or representatives of life insurance companies, who were on cordial terms with him. They had frequently requested him during years of business contact to give them the names of his customers who might likely become interested in life insurance. The defendant, in several instances, interested himself in their behalf by assisting them with information and using his good offices with his patrons in procuring applications of desirable prospects for life insurance policies in the several companies represented by said agents. There is nothing in the record which tends to indicate that he did not conduct himself and his business in an orderly and businesslike way, until after he became the special subject of a most intensive investigation conducted by the district attorney's office, aided by a dozen or more investigators attached to that office working in concert with certain members of the police department and the sheriff's office. The starting point of the investigation is not made certain by any member of the party in charge of the investigating forces but evidently it was begun shortly before the defendant was taken into the personal custody of said officers, and held in detention for several days in a private residence, without authority of law. Not until the alleged confession of the defendant had been procured, which will hereafter be considered, was he formally charged with the murder of Mary James, and officially lodged in the county jail, the place provided by law for the detention of persons held to await trial for the commission of felony charges.

Defendant, Robert S. James, and Charles H. Hope, were indicted on May 6, 1936, and arraigned on the same day. On May 11th, each defendant entered his plea of "Not Guilty" and James entered the further plea of "Not Guilty By Reason of Insanity". The case was thereupon set for trial to begin June 22, 1936. Defendant's application for thirty additional days to prepare for trial and to take the

deposition of witnesses residing in the State of Alabama as to his mental condition, was denied. Counsel entered into stipulations as to the taking of certain depositions and the trial began on June 23, 1935. On the following day Hope was sworn and became a witness in behalf of the prosecution. On arraignment day the Court appointed the public defender as attorney for Charles H. Hope, but as he withdrew his plea of "Not Guilty" and entered a plea of "Guilty as charged in the indictment" on or before the first day of the trial, the public defender appeared in court only at such times as it was necessary for him to join in a request for the postponement of judgment to a day subsequent to the conclusion of the trial of James, which event occurred on July 28, 1936. That Hope's change of his plea and alignment with the prosecution was induced by the hope of receiving some favor or immunity is too self-evident to require argument. The judgment pronounced by the Court upon Hope was imprisonment for "the term prescribed by law". This judgment relieved him of the death penalty. Four days prior to the day judgment was pronounced on Hope, Robert S. James had been found guilty of murder of the first degree, which carried with it the death penalty, and the Court, on September 10, 1936, made a formal pronouncement of judgment by imposing the death penalty on him in accordance with the jury's verdict. The plea of "Not Guilty by Reason of Insanity" was withdrawn and this appeal was taken from the order denying defendant's motion for a new trial and from the judgment of conviction; also upon assignments of misconduct on the part of the district attorney and the Court respectively, during the course of the trial. It is sufficient to concern ourselves only with those assignments which constitute the major grounds of the appeal.

It can be said without fear of overstatement of the fact—if the circumstance is of sufficient importance to merit mention of our judicial records—that in no case which has [fol. 2634] come to the attention of this Court for review, in its entire judicial existence, has the spectre of weird, ghastly and unnatural wickedness, from first to last, stalked a judicial proceeding in such hideous forms as are set forth in the presentation of the instant case on behalf of the People. The rule is well settled in criminal law that evidence pertinent to the investigation of a material fact or issue in the case is admissible notwithstanding the fact that

it may tend to reflect prejudicially or unfavorably upon the character or credibility of the person whose acts are under investigation. But the rule is otherwise when it cannot be seen that proof, or proffered proof of an alleged fact or condition, would tend to establish the *corpus delicti*, or prove a single fact material to the case, but which, on the other hand, would have the effect of producing a state of mind that would render it less probable that the verdict would reflect the calm and dispassionate consideration of the jury unbiased by repeated references to improper matters.

Lord Chief Justice Hale's admonition uttered many years ago as to the great care and caution that should be exercised in the examination of those accusations and acts, detestable in nature and which are easily made and hard to be defended against, has been adopted as a canon of our American law. He said in part: "• • • the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over-hastily carried to the conviction of the person accused thereof by the confident testimony sometimes of malicious and false witnesses." Doubly aggravated becomes the error where matter of the ineffaceable type is emphasized by frequent and vehement references both in the evidence and in argument. The reason for the observance of the rule which excludes all allusions to highly prejudicial or defamatory matters—true or untrue, and whether expressed in words or by exhibits—is that the minds of the investigators may be free to weigh dispassionately close and vexatious questions of fact unaffected by prejudice or hatred arising out of extraneous matters. It is not only the theory but the mandate of the law that every person accused of crime is entitled to be tried by a jury charged with the duty of making an earnest effort to resolve every reasonable doubt, intentment of law, and presumption of fact in favor of innocence, where it can reasonably be done, and where two opposing conclusions may be drawn from a given statement of facts, the one leading to innocence should be adopted, and the other, leading to guilt, should be rejected. The minds of the jurors must be kept free and uninfluenced by any matters or things which will tend to hinder them in strictly following the law in the discharge of this important office. The degree of harm or damage that may ensue by the violation of this age old rule of law is relative to the particular

or kind of acts which constitute the particular crime under investigation. From what has been said we do not mean to imply that facts which are admissible under the law are to be excluded from the case because of any inherently prejudicial quality which they may possess, but we do say that if the offense is of such a nature that it must, from necessity, arouse in the mind of the average person a deep sense of aversion to a person charged with the commission of such offense, that circumstance does not give the prosecution the right to add other prejudicial matters which bear no proper relevancy to the crime charged, and which would thereby [fol. 2635] place the defendant in a more unfavorable light in the eyes of the jury, than he would have stood had the inadmissible evidence not been injected into the case.

It is appellant's contention that the double theory adopted by the prosecution as to the manner by which the life of Emma James was planned to be taken, first by the rapid and effective method of drowning, and secondly, by the much slower and less certain method of bringing about her death by the venom of a rattlesnake, are too self-contradictory, inconsistent and absurd to form a common basis, and the two theories with their weird ramifications were invented and built up for the sole purpose of fomenting a state of irremediable hostility and ineffaceable prejudice in the minds of the jurors against the defendant, and were intended to serve, and did serve, as grounds for depreciatory allusions and references to matters which could not have been of the least assistance to the jury as aids in arriving at the truth of the charge. One rattlesnake was not deemed sufficient to execute the asserted fiendish purpose of the accused, according to co-defendant Hope, but three or four were obtained by him notwithstanding no claim was made that the deceased was bitten by more than one, and only one of the two fangs which rattlesnakes normally have, produced any mark upon the toe or body of the deceased, and that was on the underside or bottom of the toe.

The final theory of the prosecution is that the deceased came to her death from drowning by the criminal act of James. What part James took in accomplishing her death by drowning is left to speculation and conjecture. The bite of a rattlesnake is offered as a contributing cause of death. The cursory examination made by the autopsy physician showed that her lungs contained an unusually large quantity of water. When found, the upper part of her body was

slightly beneath the surface of the water in a lily or fish pond. It requires no expert evidence to establish the commonly known fact that drowning takes place within a very short time upon submersion of the human head, and in far less time than is required for the venom of a rattlesnake to be carried through the blood stream from the toe, where the circulation of the blood is more feeble than in any other part of the human body, to the vital organs and cause death, even in those cases in which death ensues.

What aid the two live rattlesnakes which were brought into the courtroom, rattling and writhing, and thus exhibited to the jury, could have been to the jury in determining the cause of death on any theory, does not appear from a painstaking examination of the entire transcript of the proceedings, and we feel satisfied that the spectacular exhibition of the rattlesnakes, in the circumstances to be hereafter noted, unquestionably constituted prejudicial error.

Rattlesnake venom, even when it proves fatal, is slow in action compared with the quick and decisive method of death by drowning. It will be kept in mind that the evidence as to the use of rattlesnakes, as a means of producing death was certainly a highly controversial issue, which rests wholly upon the word of Hope, an accomplice, whose testimony is not sufficient to support a conviction unless it is corroborated to the extent required by section 1111, Penal Code, and that issue was opposed by the only other witness to the alleged fact, the defendant, who unqualifiedly denied Hope's testimony as to the part rattlesnakes were made to play in hastening or having anything whatever to do with [fol. 2636] the death, or with any attempt to encompass the death, of the deceased. If Hope's testimony on this issue should be discredited, it would necessarily tend to impeach him generally. The rattlesnake issue is important for the further reason that a person who causes rattlesnake venom (poison) to be injected into the blood stream of a human being would be guilty of first degree murder in the event it actually caused death. In all likelihood the person so causing the death would be condemned to suffer the death penalty by virtue of the provisions of section 189, Penal Code, which provides that "all murder which is perpetrated by means of 'poison' or 'torture' is murder of the first degree, or under the general rules of law which pre-

scribe that all murder committed in an unusually cruel manner is murder of the first degree and subjects the perpetrator to the death penalty, at the discretion of the jury trying the case. We mention the penalty because a great deal of evidence was introduced in the case in support of the theory that the deceased, who was six weeks advanced in pregnancy, and had suffered from nausea, dizziness, and kindred symptoms of pregnancy to a degree that she became unusually miserable and discouraged as to her ability to pass through the ordeal of childbirth, may have come to her death by an attempted abortion practiced by Hope, with the assistance or connivance of James. The theory of accidental death caused by falling in a fainting spell, or by self-infliction also were issues which the defendant had a right to have the jury pass on.

If death ensued as the result of an attempt to commit an abortion, the degree of crime would not be higher than murder of the second degree, the maximum penalty being life imprisonment. Thus the penalty for criminal abortion was commensurate with the term meted out to Hope under his plea of guilty. We mention this matter in view of the Court's instruction to the jury that if it returned a verdict of guilty, it could not be less than murder of the first degree, and also as bearing on the reference made to the punishment of abortion during argument of counsel for the People as tending to buttress Hope's righteous motives; further, its tendency to render less effective the inferences which the defense was entitled to draw by reason of the delay in passing judgment on Hope's plea, which was early changed from "Not Guilty" to "Guilty", until after he had testified and the jury had rendered its verdict in the James case. Counsel for the People in decrying the abortion theory in his argument to the jury stressed the point that if the abortion story was true, Hope would have been a foolish man to have entered a plea of guilty of murder of the first degree with a possibility of suffering the extreme penalty in view of the principle of law that if Mrs. James died "as the result of an abortion to be performed on her by Mr. Hope, the very most that Mr. Hope could be guilty of, under the evidence, would be murder of the second degree, for which his life is not in jeopardy". At this juncture counsel for the defense interrupted with the objection that counsel had no right to instruct the jury as to matters

of law. The Court agreed with the objecting counsel that the jury must accept the law as given by the Court, but in so doing said that in view of what the deputy district attorney had stated the law to be "the Court informs the jury where an illegal operation is performed and death is a result therefrom and is caused thereby, the person performing such illegal operation is guilty of second degree murder". The jury was not instructed and therefore did not [fol. 2637] know that punishment for second degree murder might equal in terms of years the punishment prescribed for first degree murder, which is imprisonment for life. That was the punishment imposed on Hope for the part he took in a homicide which the prosecution in its argument denounced as equaling the foulest crime that blackens the pages of our criminal calendars. The effect of the incident above referred to was to bolster up and support Hope's testimony on the theory that if death was in fact caused by an attempt to perform an abortion, he would not have thrown away an opportunity to avail himself of that defense, and thereby preclude the possibility of the infliction of the death penalty. It is convincing beyond all question from the vigorous and vehement manner in which the death penalty against James was urged at every stage of the proceedings as the only verdict that could vindicate the law, that an offer on the part of Hope to plead guilty to second degree murder, if made, would have been rejected inasmuch as it would have tended to weaken the theory on which the death penalty was urged against James. Such a plea would have practically committed the prosecution of James to the abortion theory. The defense insists that its claim made throughout the trial, which in substance was that Hope was induced by promises that if he would change his plea of "Not Guilty" to a plea of "Guilty", and align himself with the prosecution, said officers would use their best efforts to relieve him of the extreme penalty, was weakened, if not destroyed, by the trial incident referred to. It is contended that it put Hope in the favorable but false light of having been moved solely by the promptings of conscience, and not at all induced by promises or understandings that his life depended on his performance as a witness, and being so moved, he voluntarily decided to tell the truth at the risk of forfeiting his life, rather than to stand on a defense which would have absolutely barred the imposition of the

death penalty. Later the abortion theory, of which there is much evidence, was erroneously, we think, ruled out of the case by the Court instructing the jury that there was but one of two verdicts that could be rendered, to wit, murder in the first degree, or not guilty of any crime. Consideration will be given later to the evidence bearing on this issue.

We are confronted in our examination of this appeal with a record of tremendous proportions, larger by far than is necessary to present every substantial question which merits serious consideration. Much space is devoted to ultra sordid and sensational subjects, many of which transgress the limits of rational conduct. The transcript of testimony contains more than two thousand five hundred pages of typed matter and the clerk's transcript exceeds two hundred pages, not to include voluminous printed briefs. This being a case in which the death penalty was imposed, and for the further reason that so many strange and inexplicable acts and incongruous situations are set forth as forming a part of the plan to take the life of the deceased, we deemed it our duty to assume the laborious task of making a careful examination of the entire record. It includes not only the proceedings had in the single charge of murder, alleged in the main case to have been committed August 5, 1935, the consummation of which the prosecution had advanced two theories, one being that Mary James met her death by drowning, accomplished by James, the motive being to collect on certain life insurance policies issued on [fol. 2638] her life in which he was the beneficiary; and the other theory being that James, with the assistance of Hope (whose part in the homicide is left in an equivocal state as to whether he acted with the criminal intent in the commission of the specific homicide alleged in the indictment or whether he believed he was aiding and abetting a plan to murder a different and unnamed person) aided in accomplishing her death by thrusting her left foot into a box containing a rattlesnake procured by Hope at the behest of James, whereby her toe was bitten by said snake, in furtherance of the plan to cause her death by rattlesnake venom. The record also contains evidence which has to do with a different and distinct crime committed in another state, some four years prior to the crime alleged in the indictment, which evidence the People claim proves, beyond a reasonable doubt and to a moral certainty, that James, being

prompted by a similar motive, conceived and executed by the adoption in part of similar methods, did, on September 21, 1932, attempt to murder, and a few days thereafter, to-wit, October 14, 1932, in the State of Colorado, succeed-- in murdering his former wife, Winona James, commonly known as Nona James, he being the beneficiary named in insurance policies issued on her life.

At the time of Winona's marriage to the defendant, she carried insurance policies on her life aggregating the sum of \$9,000 payable in case of death by natural causes. One of said policies which paid a death benefit of \$5,000 also provided double indemnity in case of accidental death. James was made the beneficiary in said policies, as he was in the policies afterwards issued to Mary James. He was paid double indemnity on the \$5,000 policy on Winona's death, proof of accidental death being satisfactorily established. The sum total which he received as beneficiary under said policies issued to Winona amounted to \$14,000.

On September 21, 1932, a few days after the marriage of Winona and James, he and his wife set out on a trip by automobile, to visit James' former home in Alabama where a number of his near relatives resided. A number of his wife's relatives resided near Manitou, Colorado, and they planned to stop on their journey to visit with them. While there, they took a trip as they had planned to do, to Pike's Peak. While descending the peak not far from its summit, (appellant's theory) the wife driving the automobile, lost control or failed to properly direct it, and it left the tortuous, steep and somewhat narrow gravelled road-bed and was precipitated a considerable distance down the mountain side before it became lodged against a large granite boulder. James, who according to his story, was viewing the scenery at the close of day with the aid of field-glasses, jumped or was thrown from the car and received minor bruises and an injury to his back. Mrs. James being unable to extricate herself from the perils of her position suffered severe fractures of the cranial structure as a result of her occupancy of the car. She was taken to a hospital at Colorado Springs where she received medical care. She regained consciousness on the following morning and when her condition warranted, she was taken to a cottage which the defendant had rented and where he remained with her until she was found around 4:30 or 5:00 o'clock in the afternoon, by her husband, lying drowned in the bath tub, upon

his return from a trip to the business district of Manitou, accompanied by the local delivery-man who was making a delivery of provisions purchased by James. The grocery [fol. 2639] store was approximately one mile from the James cottage and James had on previous occasions ridden with the delivery-man in making deliveries to the cottage. The cause of death was examined into by the county coroner and the officials who are charged with the duty of examining into the causes of death in such cases and no suspicion of any criminal agency was hinted at until April, 1935, some three years after the murder is charged to have been committed, and some eight months after the death of Mary James of whose murder the defendant stands convicted. It seems that the investigators of the district attorney's office for some time had been working on the theory that the defendant had murdered his wife. It came to them from some source that the defendant and Lois Wright were living together in incestuous relations. It was in the investigation of the incest charge and from information furnished by Madge Reed, whose connection with the case will later be considered, that the indictment was found. The investigators of the incest charges, which resulted in three convictions, and the murder charge involved in this appeal, and the murder of Winona, claimed to have been committed in the jurisdiction of Colorado, were developed together by the investigators attached to the district attorney's office, working in conjunction with certain members of the Los Angeles police force and the sheriff's office. James was taken into custody at his home, No. 3886 South La Salle avenue, and was held in detention in a privately owned residence, No. 3882 South La Salle avenue, located next door to his home, under the exclusive control of the prosecution's forces. In this house a dictaphone had been installed for spying purposes, operated under the direction of Police Officer Everett E. Kynette, the head of the "Spy Squad". The means by which the evidence was obtained to effect James' conviction on the incest charges does not appear, but it is probable that it was accomplished with the use of the dictaphone apparatus and the spy system which was admittedly operated from the house in charge of the investigators located next door to the James home.

It would not be within the reasonable observance of the limitation of space or time to attempt anything resembling a complete review or analysis of the evidence introduced

into the case. In fact, it would be practically impossible to harmonize much of the testimony given by the prosecution's chief witness, Hope, with a course of rational conduct. The motive which might prompt the commission of crime ordinarily discernible in every criminal case, is unquestionably present in the instant case, but the evidence amassed to prove the plan of execution takes such a wide departure from a normal course of conduct, making due allowance for the abnormalities of the criminal minded, as to require close scrutiny of the testimony of the witness upon whom judgment of conviction must ultimately stand or fall, as tested by the rule of reasonableness and examined in the light of the strength of the evidence relied upon to support the indictment.

There is little in the record which sheds light on the background of Hope's life. He was thirty-seven years of age at the time of the trial, and testified that he was married. He testified that during the year immediately prior to the trial he had been engaged in the business of "building maintenance" without stating the nature of that business or where he was so engaged. He spoke of having been engaged in business at Pomona during his acquaintance with James but when asked by counsel for the defense the kind of business he was engaged in an objection to the question [fol. 2640] interposed by counsel for the prosecution was sustained on the ground that the question was immaterial. It appears by affidavits that he is an ex-sailor and had worked as a floor finisher. It also appears that he had had some kind of employment or connection with a drug concern for a time and that his employment was generally of the casual kind and in the nature of odd jobs. Evidently he was not engaged in any continuous employment and was idle a large portion of his time. He testified that he had known James for a period of seven years and that he had been a customer of his barbershop at irregular intervals and had at other times dropped in to exchange words of greeting. He also had borrowed small sums of money from James and had otherwise sustained friendly relations with him. James had let him use his car on a number of occasions. There is no suggestion in the record that a purpose to engage in a criminal conspiracy to take the life of any person by the instrumentality of poisonous reptiles, or otherwise, existed in the mind of either of the parties, until suddenly and unexpectedly, in the month of June, 1935, as

the two walked from James' barbershop, James said to Hope, according to the latter's testimony, that a friend of his "had a wife who had been bothering him a bit and he was going to kill her and [the friend] wanted to get some rattlesnakes, and laughed about it." Hope corrected the above statement which he attributed to James to agree with the earlier testimony given by him before the grand jury in explanation as to the reason why the friend wanted to kill his wife, to read as follows: "I have a friend who has a wife that is keeping him broke and he wants to kill her. He is going to kill her with a rattlesnake." He further corrected his testimony to agree with his grand jury testimony, to read: "He (James) said this man will give you \$100 to buy these rattlesnakes."

It is the testimony of Hope that he did not know the identity of the woman thus marked for death but he nevertheless set about to procure and did procure rattlesnakes which he believed were to be used in the commission of a murder for which he expected to receive the sum of \$100. Hope testified that he did not know the snakes were intended to be used as a means of killing Mrs. James until a very brief period before he assisted James in carrying the box containing the rattlesnake into the dining room, where, as he described, Mrs. James was lying on her back, strapped to the dining room table with her limbs extending beyond the edge of the table, and with strips of adhesive tape pasted across her eye-lids and over her mouth, with no garment on her body but a night-gown, partially upraised.

That Hope was at least given to the inordinate use of alcoholic spirits whenever obtainable is apparent from the evidence. His admissions, if accepted at their face value (but which are in the main repudiated by the defendant), would stamp him as occupying a low plane in the scale of moral perverseness, willing to take life by adopting indescribably wicked and cruel means of torture.

A large mass of evidence in the form of depositions bearing on James' mental capacity and temperamental characteristics as exhibited in his adolescent period and during his early manhood, was injected into the case by the attorneys for the defendant, primarily offered as tending to show that he was congenitally a weak-minded and incompetent person.

This testimony was primarily offered for the purpose of affording grounds for the exclusion of any testimony bearing on the purported confessions made to the investigators, on the grounds that James was a person without [fol. 2641] sufficient understanding and lacked the mental capacity to appreciate the import and effect of the alleged statements, or confession, which it is claimed he voluntarily made, and that he was mentally unable fairly to protect himself without the aid or advice of someone against the methods applied by the massed forces of trained and experienced investigators. This testimony, in the main, had very little, if any, relevancy to the commission of the specific act charged against the defendant, and it was not in itself sufficient to show that he was a person who, under normal circumstances, was unable to appreciate the common affairs of life. Whether he was a person who would be more likely to fall a prey to coercive methods than the average individual was a proper matter for the jury's judgment in the light of all the circumstances shown by the evidence, whether direct or deducible by reasonable inferences from proven facts. The mental capacity of a witness so far as it affects understanding or the intent of the person whose act is the subject of inquiry, is always a matter for the jury's consideration. The evidence was not of the kind, however, that would excuse the commission of a homicide on the ground that the accused was insane. The evidence bearing on the formative periods of his life disclosed both commendable characteristics and acts of youthful folly, neither better nor worse than those which might be expected to mark the conduct of the average boy reared under similar circumstances. It may be noted that it appears that he married in early manhood and whether this first wife died or the parties became divorced is not made clear. Whether the marriage was dissolved by death or divorce is not relied upon as a material issue in the case. It further appears that the defendant was a fancier of, and, at times, was the owner of, game chickens and a particular breed of bulldogs.

His acts with respect to matters that occurred during his maturer years will hereafter receive such notice as their relevancy may seem to require.

We are now brought to a consideration of the evidence which has a direct bearing on the specific murder alleged in

the indictment, to-wit, the alleged felonious killing of Mary Emma James, with malice aforethought.

Mary Emma James' name before marriage was Mary Emma Busch, and she was a beauty parlor operator. She was a woman evidently in her thirties and James was approximately forty years of age at the time they were married. Mary Emma Busch, to whom we shall also refer to as Mary or Mary James, entered the employ of James in March, approximately five months before she was discovered dead, August 5, 1935. She and Miss Viola Lueck, who since the death of Mary James, married James Pemberton, had been companions and intimate friends for approximately two years prior to the marriage of James and Mary Busch. Miss Lueck was an employee of the telephone company. She met James for the first time the next day after Mary Busch (Mary James) had become acquainted with him. She and Mr. Pemberton were engaged to be married during the period of time immediately preceding Mary's death, and it had been arranged that the wedding was to take place at the James home. Naturally a relation of cordiality and friendship existed between James and wife on the one hand, and Mr. Pemberton and his intended bride, on the other. Mutual social relations existed between the two couples, and exchanges of social courtesies were quite frequent. The James home was located at 1329 West Verdugo road, La Canada, county of Los Angeles. The home [fol. 2642] was pleasantly situated and was built in cottage fashion. The yard was planted to garden grasses and contained shrubbery, flowers and a few orange and fruit trees. A lily pond occupied a part of the front yard. Cement walks led to and around the pond and walk-ways meandered the gardens. A garage, a chicken pen, in which some four dozen chickens were kept, and a yard in which three dogs were kept, constituted the rear of the premises. The house appears to have been located in an attractive sylvan district.

Mr. Pemberton and Miss Lueck had visited Mr. and Mrs. James on Wednesday evening, July 31, five evenings prior to the finding of Mrs. James' dead body. At that visit the celebration of the Pemberton-Lueck wedding was discussed. It was arranged on that evening that the James were to take dinner with Miss Lueck and Mr. Pemberton at the apartment house where Miss Lueck was living, on Monday

evening, August 5, provided Mrs. James, who had been suffering from symptoms of pregnancy, was able to come to Los Angeles. If not, they were to dine at the James' home. About two o'clock Monday afternoon, August 5, James called up Miss Lueck at her apartment, and told her that Mary was not feeling well enough to come to Los Angeles and asked her and Mr. Pemberton to come out to his home for dinner. He said that Mary had the vegetables ready, and that he would stop and get the steaks and necessary food on the way to his place. He said that he would meet her in front of the telephone office where she worked at 7:30, after he closed his barbershop. James arrived in due time with Mr. Pemberton, whom he had picked up on the way to meet Miss Lueck. The latter got into James' car and the party drove to a market, where James bought steaks and some cottage cheese. He said the cottage cheese was for Mary in case she could not eat steak.

The three, James driving, arrived at the James' cottage at 8:10 or 8:15 in the evening. He drove into the driveway at the back of the house and parked. Both witnesses, Miss Lueck and Mr. Pemberton, testified that James' conduct and appearance was usual and entirely normal. There were no lights in the house and the doors were unlocked. All the parties entered the house through the rear door and looked into all the rooms, and Mr. James and Miss Lueck called Mrs. James a number of times. Someone suggested that she might have fainted on the grounds and her body might be concealed by the shrubbery. The parties opened the front door and James observed a note under the door which he picked up, stating that someone had been there on that day or the day before. Mr. James read the note aloud. It was written by Mrs. Ethel Smith, James' niece, and left in the crack of the door. Sunday, August 4th, she and her husband, and the father and mother of her husband, had called at about 5 o'clock, and finding no one home, she left the note. The doors were locked and the blinds were carefully drawn. James suggested that a search be made of the yard and he got a flashlight. Pemberton was familiar with the front yard, but not with the back yard. He went into the front yard and James went into the back yard. In his search about the grounds he followed a narrow walk which led through the shrubbery to the side of and skirted the fish pond. At this point he discovered Mrs. James' out-

stretched body. The lower limbs were resting across the narrow cement walk which was close to the water's edge and her head and upper part of her body extended into [fol. 2643] and was slightly submerged beneath the surface of the water, her face facing downward. He made an exclamation and went to the rear of the house to meet Mr. James. He told him to brace up, that he had a "shock". He told him Mrs. James was dead. He attempted to prevent Mr. James from going to where the body lay but he was unable to do so. James knelt down beside the body and tried to lift her from the water but was unable to do so and Pemberton assisted him in pulling the body back so that the head was clear of the water. He finally got Mr. James up and he had Miss Lueck take him into the house and he left to notify the sheriff's office at Montrose. Mrs. James was described by him as wearing pajamas. Miss Lueck also said she had on pajamas and bedroom slippers. The light wire fence which enclosed the rather shallow pond was crushed at the point where the body had lain. The pond was approximately twelve or fourteen feet in dimensions and the water was from ten or twelve to sixteen inches in depth, the bottom being covered with cement. Miss Lueck testified that James was moved to tears and kept repeating, "Oh, I am so sick; what will I do without her." He was apparently deeply grieved and was taken to a couch in the yard where he was apparently prostrate for some time. A physician who had been summoned to the home administered to Mr. James. He was afterwards taken to the place where Miss Lueck lived and given such care as his condition seemed to require. That his grief had all the appearance of being genuine and not simulated is testified to by Miss Lueck and Mr. Pemberton who were in close social relations with James and his wife, and by all who were in a position to have had any knowledge of the subject. The testimony is to the effect that James was kind and affectionate in his treatment of his wife and both seemed happy in their marital relations. The home was pleasantly appointed and the grounds are described as being exceptionally beautiful.

In going through the house in search of any message that Mrs. James may have left, or any evidence which might throw light on her death, Miss Lueck discovered in a dish or bowl on a table in the dining room, a sealed blue envelope addressed in pencil to Mrs. James' sister, Mrs. R. H.

Stewart, Las Vegas, Nevada. She called Mr. James' attention to it and he requested her to open it. The letter was written in pencil on blue stationery, corresponding to the envelope, and was in the following words:

"Dear Sis.

"Just a line this morning to let you know I am pretty sick. My leg is all swollen, something bit me while wattering my flowers this morning. I cut my toe yesterday and having lots of bad luck, this is old blue Monday, but my daddy will be home early to nite and he takes good care of me.

"Be sure and write me soon and Ill let you know how I get along. Sis."

On the back of the envelope is written: "From Mrs. R. S. James, 522 W. 8th St. Los Angeles."

The letter is concededly in the hand of Mrs. James but it is claimed that it is not written in the legible and steady hand which usually characterized her hand writing as shown by exemplars.

It is the contention of the prosecution that the letter was written under the compulsion and dictation of James or as Hope's testimony would indicate, at a time when she was under the influence of intoxicating liquors. Hope's testimony was that Mrs. James drank large quantities of [fol. 2644] whiskey during the last hours of her life. James testified that she never, at any time, drank any liquors and further, that she was continuously suffering from nausea and dizziness caused by pregnancy, and it was with difficulty that she could retain any kind of food or fluid on her stomach. She had consulted Dr. James De Witt George, an obstetrician and gynecologist of the city of Los Angeles twice as to her condition, first on July 16th at his office and again on July 30th, five days prior to her death, at her home. The physician testified as to her pregnancy and as to symptoms of nausea and sleeplessness. He prescribed for her.

In further refutation of the alcoholic indulgence told by the accomplice Hope, the autopsy physician, Dr. F. A. Wagner, who made a chemical test of the stomach and kidneys the day following death as to the presence of alcohol, reported that he found none. At the time he held the autopsy he reported death from drowning. He also reported acute

cellulitis of the legs. Cellulitis is an inflammation of the cellular tissues. No suspicion existed in the mind of anyone that Mrs. James' death was caused by criminal means until several months thereafter. The body was exhumed nine months after burial and a re-examination of it was made after the Hope rattlesnake theory had been advanced by the investigator in the case. Dr. Wagner had given no thought to the rattlesnake theory until the subject was pressed upon him by one or more of the investigators. With this suggestion in mind he reconsidered his former report. He performed the autopsy on the day next following the day her body was found as heretofore related. He testified that he found a laceration on the under surface of the left great toe. The left leg was considerably swollen. The lungs contained a considerable amount of water. There was no disease of any of the vital organs. The uterus showed a normal pregnancy of proximately six weeks duration. Superficial bruises, showing black and blue spaces of varying extent were found on certain parts of the body.

A chemical analysis of the stomach, liver and kidneys did not react to, or show the presence of any poison. He defined "acute cellulitis" as a swollen or inflamed condition of the tissues. He said "it may be due to anything of a micro-organic nature". The discoloration of the leg was quite marked to the knee. The swelling continued to the hip. The bruises or contusions upon the body were on the chest and the interior portion of the right arm and extended to the back of the arm. He noticed slight bruises or scratches on the forehead and face. Evidently the witness in describing the body and its condition was using, for purposes of illustration, a photograph taken after the body had been disinterred, and it is not clear in some instances as to whether he was testifying to the condition that existed at the time of the autopsy or as it existed after it had been exhumed nine months later. His first examination was cursory merely. That physical and organic changes of the body must have taken place during its long burial period would be an inevitable result. When the body was brought into the morgue after nine months' burial the skin had slipped from the left leg. The doctor stated that cellulitis (which is medically defined as inflammation of the cellular tissue) was the result of bacterial action. It was due to

an infection of some kind, animal or vegetable. It could have been caused by the bite of a rattlesnake, venomous insects or spiders, or by the inoculation of vegetable bacteria. The notes taken by him at the autopsy, he said, were [fol. 2645] very brief. Asked whether he had reached any opinion as to what had caused the incision on the bottom side of the toe, his answer was, "Not a definite one, no sir." He had never seen a puncture made by the fang of a rattlesnake, nor had he ever seen anyone who had been bitten by one. He described the puncture as resembling one made by a nail or any other ordinary pointed instrument. The laceration was about a quarter of an inch long and led away from what he thought was the point of entry. He was of the opinion "that one *could* come to the conclusion that it *could* have been made by the bite of a rattlesnake". It was possible that it could have been made by a thorn. He said that he had definitely formed the opinion that there was a puncture but it is quite manifest that he paid but little if any attention to the laceration at the autopsy and made no special examination of it. He made no attempt to determine whether the cellulitis was caused by vegetable or animal bacteria. In giving, on direct examination, his conclusion as to whether the puncture or laceration was made by the fang of a rattlesnake or by some other means, he said: "From the description of the bite as shown in the literature [and the condition described by the witness] one *could* come to the conclusion that it *could* have been made by the bite of a rattlesnake or anything else that would have a similar instrument for making such a puncture or laceration." He was then asked: "Q. Did you reach such a conclusion? A. I did." As to whether the cut on the toe was made by stepping on a nail, thorn, or was made by coming in contact with any other sharp instrument was not of itself a question of expert evidence. The doctor suggested that he was no better qualified to testify on that subject than a layman would be. On redirect, the doctor said the cellulitis was more like that caused by venom or poison than the growth and development of a toxin of bacteria. He further said there was evidence of a gangrenous condition. The doctor was not positive as to what caused the condition found on the leg. He could not say the condition he found had not been caused by the bite of a black-widow spider or other poisonous insect.

Dr. Gustave F. Boehme, called as a specialist on the habits of rattlesnakes and snake venom, and who had himself been bitten by a rattlesnake and had treated a patient who had been so bitten and had seen others who had been bitten, made an examination of the body of Mrs. James with Dr. Wagner May 5, 1936, nine months after burial. Superficial material which had accumulated on the limb was removed. The left leg was very much enlarged as compared with the other leg and it was markedly discolored, almost mahogany in color. There was some swelling on the lesion from the knee to the hip. Running across the great toe he observed an old laceration about a quarter of an inch in length. "So far as the wound itself was concerned," the witness continued, "*it could* have been caused by laceration; *it could* have been caused by snake bite; *it could* have been caused by *some other method*, but combining it with other findings in that, I did come to an opinion." "Q. What is that opinion? A. That opinion was that *probably* this woman's toe had been bitten by some venomous creature, *probably* a snake, and all the findings on the leg were *compatible* with such a finding." The specialist testified that the venom of a snake (no doubt the same law would apply to all other venomous insects and members of the reptile family) travels "by the lymphatics" and not so much by the blood vessels which causes progressive [fol. 2646] localized swelling. The venom acts on the blood vessels to produce large black and blue areas. From the physical findings corresponding to a snake bite on the woman's leg, the witness concluded it was a *probability*. (All emphasis added.)

The single laceration, instead of two (rattlesnakes have two fangs) and the position of the laceration on the bottom of the toe, the specialist said, could be accounted for "by the fang striking at an angle, *perhaps*". The witness testified that when the fangs of a rattlesnake enter those parts of the human anatomy where the blood vessels are large and numerous the venom is more rapidly absorbed and carried to the vital organs than it would be if injected into the toe. Swelling following the injection of poisonous reptile virus becomes perceptible from two to four hours thereafter. In cases where it proves fatal death usually ensues from sixteen to twenty-four hours unless the progress of the poison is arrested. Of course, much depends upon the

amount of virus injected, the physical condition of the person, and the part of the body into which the virus is injected. Over the objection of the defendant, the witness, Dr. Boehme, testified that on May 5th, nine months after Mrs. James' death, Snake Joe, extracted the venom of two rattlesnakes (one of which it is claimed was in the box into which Mrs. James' foot was forced), and the witness gave in detail the process by which it was extracted from the fangs, and injected by him into the bodies of two guinea pigs. He described minutely the manner in which the guinea pigs died. The squeal of pain, twitchings, convulsions and final death struggles which followed the injection of the venom were dramatically told. The guinea pig lived twenty nine minutes. The second, which had a lighter solution of venom injected into its body, showed similar symptoms. It died in one hour and twenty-nine minutes after injection, writhing and twitching in pain. The injection was made in the interior abdominal wall. An examination was made and the walls of the abdomen were found to have turned black and blue and the intestines were in sharp contraction, and were also black and bluish, or discolored. The stomach presented the same appearance. The lungs held a large amount of blood and the heart was contracted. The heart, lungs, kidneys and stomach of Mrs. James, were, according to the autopsy physician, normal and showed none of the signs found in the guinea pigs, as described by the doctor who performed the guinea pig autopsies. As between the bite of a black-widow spider, a tarantula and a rattlesnake, the witness said that the condition of Mrs. James indicated that it was caused by the bite of a rattlesnake. The doctor testified that where the fang of a rattlesnake enters the flesh there is an area of suppuration or festering about the wound. The history was obtained from Dr. Wagner and from what he saw, the wound did not indicate suppuration. He was then asked if the absence of suppuration did not indicate that the wound was caused by something else other than a rattlesnake bite and his answer was: "Well, it may have been some other,—produced by some other instrument that was not infected." Dr. Wagner when asked whether the condition he found was of the nature of bacteriological infection or of the venom type said: "It was more like that which is caused by a venom or poison rather than the growth of and development of a toxin of bacteria." He said he found nothing which would

tend to contradict a story of infection by snake bite, but on the other hand, he did not say that he found a condition [fol. 2647] that would justify him in concluding that only the venom of a rattlesnake could have produced the condition which he described; nor was he willing to say that the condition he saw could not have been caused by numerous and common bacterial infections which are wholly separate and apart from venom poison. He did see evidence of a gangrenous condition. There was nothing so unusual as to the appearance of the body when the autopsy was made as to excite more than passing notice. No chemical test of microscopical examination was made at any time to determine the nature or cause of cellulitis.

The testimony of the two expert witnesses called by the People to prove or demonstrate that the condition which they described had its origin in or was caused by rattlesnake venom or any one of the many other potential causes, is so vague and indefinite as to unmistakably disclose a state of grave doubt and uncertainty on the part of the witnesses as to whether the condition which they describe as cellulitis was the result of a snake bite, or was produced by any other of the many causes known to medical science. Their testimony as to this issue, even regarded as opinion evidence, is so weakened by qualifications, such as "it could have been", or "might have been" caused by rattlesnake venom, and by indulging in possibilities and probabilities as to reduce its evidentiary value quite to the level of conjecture and speculation as to what did cause or may have caused, a condition which is neither unusual nor uncommon in the practice of medicine. Mrs. James was some six weeks advanced in pregnancy and there was evidence, given by the defendant, it is true, to the effect that she was in the habit of taking off her shoes during the warm August days and walking about the walks and yard, and she had mentioned the fact, according to James, that she had stepped on something which had cut her toe. This is in accord with the reference made in the letter addressed by her to her sister which the prosecution contends was written by Mrs. James at the dictation of James while she was intoxicated.

It is not disputed that the condition as described could have been caused by the entry of toxic or bacterial poison through a laceration or cut of the flesh however made. The truth or falsity of James' testimony was a matter for determination by the jury in the exercise of its discretion in

subordination to the rules of evidence. Excluding his testimony entirely as to this issue, the question is, however, as to whether there is substantial expert evidence to support the contention that the cellulitis was caused by the bite of a rattlesnake. Giving full import and significance to the language contained in the record, it is apparent, as a matter of law, that it is too uncertain, indefinite and doubtful to establish the fact for which it is offered, unaided by corroborating evidence from other sources. The prosecution must therefore look to the testimony of Hope or the alleged confession of James for substantial corroboration.

In reviewing the story as related by Charles H. Hope, sometimes called "Chuck" Hope, we will adopt his language and method of expression as nearly as it is feasible to do, resorting to quotation points only in such instances as it may appear necessary to express the exact meaning of the witness.

We have already spoken of his plea of guilty entered soon after the trial began and the judgment of life imprisonment imposed upon him at the conclusion of the James trial. Our attention will be directed to a statement and review of his testimony as it appears in the record [fol. 2648] before us with such pertinent comments and references to other evidence or circumstances or instances as may bear directly on the particular issue under discussion. The story as related by him follows: He had known defendant James for a period of about seven years prior to August 5, 1935. During that period he had visited James' barbershop at intervals of from one to two or three weeks either as a customer or in making passing calls when he was not employed. He had borrowed small sums of money from him at various times.

In June, 1935, at the barbershop, out of a clear sky, James asked him if he knew anything about rattlesnakes and Hope said, "No." James asked him if he could find out about them, and Hope said he would try. Hope said James' explanation of his inquiry was that "he had a friend who had a wife who had been annoying him quite a bit and he wanted to get some rattlesnakes, and he laughed about it." James told him if he would get him some snakes he would give him \$100. Hope testified he saw him again in a casual way at the barbershop during the later days of June, and James asked him if he had found out about rattlesnakes, and Hope said he thought he could buy some for him. Hope purchased

three from R. H. Kirby, a keeper of a place of amusement and a dealer in reptiles. Hope took the rattlesnakes to his apartment, where he kept them for two days and then delivered them to James, at his home. Hope paid the snake dealer \$5 for the snakes. James asked him where he got the snakes and Hope told him it didn't make any difference and left. James gave him \$20. He saw James later at the barbershop. Hope was then getting ready to move to a different part of the city. James told him he could come out and stay at his home for four or five days; that he had some work he could do. He went to James' home and stayed there several days. Hope, on James' instructions, had a cabinet maker make two boxes in which the snakes were to be kept, and he was instructed to tell the cabinet maker, if he asked any questions, that they were to keep white mice in. Hope testified that he bargained for two white mice when he purchased the snakes. The boxes were 24 by 9 inches and had a glass sliding top. He paid \$5 for the boxes. Hope delivered the boxes to James and he put two snakes in the box for delivery to the man who had a troublesome wife. James told him he wanted a hole cut in the side of the box large enough to permit the insertion of "two fists". Hope said he did not see James again until he called at the barbershop about the middle of July. James told him the man was dissatisfied; he said the snakes were not fighters; that he and his family had been to Ocean Park and saw good snakes there. That afternoon James and Hope went to the Ocean Park snake pit and avoided the appearance of being acquainted.

At this point the witness seemed confused and his testimony was incoherent in some particulars. He said, "When we went to Ocean Park we submitted them and sold them for seventy cents a pound. James asked me if I was busy that afternoon and I told him I was not. So I went down to Ocean Park with him." They then went to the pit and waited for an hour. "I was asking him questions—I didn't hear a whole lot of it, but I did hear from the man that owned the pit say, 'I will bet you \$20 there isn't a poisonous snake in the pit.' I went around on the other side as he [James] told me to do and I didn't want anybody to think we were together. * * * I heard Mr. James say to the man that owned the pit as he walked over to my seat and he [fel. 2649] pointed out one snake and said, 'That's the one I want and left'." His testimony that the owner of the

pit made an offer to wager \$20 as above set out was later changed to make it read that James made an offer to wager \$20 there was not a poisonous snake in the pit at the time. Some confusion as to the Long Beach exchange of snakes brought forth the following questions and answers: "Q. And you gave the snake which you had purchased at Long Beach to the man at Ocean Park? A. Yes, sir. He wasn't there at that time. They had a doctor there. I waited for this man to show up and he didn't show up there. I said, 'We are very hot,' and I said, 'Wait there while I dump this snake—'. What he said to the doctor of undisclosed identity, was stricken out on motion. Hope said he waited until the snake man came and he, Hope, pointed out what he thought to be the snake that James had selected from the pit the day before. The man put it in a box and Hope delivered it to James' barbershop. James paid him \$5 for the snake and went home and Hope went his way. When working, Hope occasionally stopped at the barbershop for service or a friendly visit. Hope saw James again after August 3 at his barbershop and James said the snake was "no good". He wanted some fighters. Hope said he had heard that the gentleman at Ocean Park had snakes that were bought of Snake Joe of Pasadena. James said, "Go over and get some if you want real fighters, they fought chickens and dogs." Hope, who said he was furnished by James with explanations as to the purpose to which the snakes were to be put, further said that he was to tell Snake Joe, in order to impress him with the importance of obtaining a poisonous snake, that he, Hope, had lost his money in a poker game—to a person not named—and that he was going to win back what he had lost at poker by betting the man who had won his money that Snake Joe actually had in his snake pit poisonous reptiles.

Snake Joe was called by the prosecution and he said that according to his book Hope was at his place on August 3, and told him he had already bought some snakes from other places, but they were not "hot" and he wanted a real "hot" one and he was directed to him. Hope said that "a friend and he had a bet on, and he wanted to kill a dog and he said if it would kill a dog he would collect quite a bit of money out of the bet and make up on the bet again, and he wanted to get 'hot' snakes." Hope bought two snakes on August 3, paying \$3 for the two. On August 4 he returned the snakes and received \$1.50 for the two. Hope told the snake

man the Humane Society had stopped the fight. This last sentence was stricken out on suggestion by the court. The sentence stricken out gives rise to the same suggestions or hints which several times appear in the evidence as to whether snakes were on occasion pitted against dogs, or other animals or game cocks in wagering contests.

Hope told James that after making inquiries all over the country he had gotten two snakes from Pasadena. One was in a glass box and the other was in a small box that had a screen door on top. He was driving James' car. He put them in the automobile and took them to Los Angeles and telephoned to James that he had the snakes. James met him in front of his shop and told him to drive around the block. James finally came out and got into the car and drove out Vermont avenue to Slauson avenue. Hope said his wife was then at his apartment. James drove the car on all occasions when Hope accompanied him, except the first. James asked Hope where he was going and he said, [fol. 2650] home. Hope's car was at Beverly and Vermont avenues. En route he and James stopped at a drug store and James gave him a prescription and handed him \$5 to have it filled and to buy "two inches of adhesive tape". He asked the druggist what the prescription was for but the druggist refused to tell him. He took the adhesive tape and the filled prescription and gave them to James. In answer to the question as what next happened, Hope, after starting an answer, called for a drink of water and the court took a recess. What the prescription contained, if the circumstance actually happened, is not disclosed. It may be suspected from several suggestive circumstances which will later be related, that it was to be used in an attempt to bring about an abortion. Hope later admitted that he had been connected with a drug company in some capacity. Upon reconvening Hope resumed his testimony. He said that after he had procured the prescription and they were on their way James told him "his wife had \$5,000 worth of insurance and he was going to collect it". James said no more on the subject so far as Hope could recollect than the above quoted words. Neither did James say anything, so far as the memory of the witness went, about Hope taking any part in collecting the insurance. At Beverly and Vermont avenues Hope got into his car and went to his wife's apartment and took her to dinner and later to a show. The witness was then asked when he next

saw Mr. James and his answer was, "I went after my wife by 10 o'clock in the morning." He then drove with his wife to La Canada and instructed her to wait on the corner. He arrived at the James residence about 12:30 or 1 o'clock, and James came out. Hope said James had been drinking a little bit. He told him he had come for the snakes and James said he could not have them right then. He had a couple or three drinks with James in the garage. The snakes were in boxes in the garage and alongside of the boxes there were three or four dead chickens. He went back to where his wife had parked and told her he couldn't get the snakes then and she apparently drove off and he went back to the garage and was there ten minutes when James came in and bluntly said: "You are in this thing as deep as I am. You have bought these snakes all over the county. I have had you visit here at the house. Different people have seen you." He further said, "Now, bring that box in the house". Hope walked ahead of James carrying the glass-top box with the snake in it. James passed Hope entering the house. He thus described the situation: "Mrs. James was lying on the breakfast table with a piece of adhesive tape over her eyes and over her mouth. He went ahead of me, raised her foot up so I could get by, and pointed to where I was to set the box, on the seat of the breakfast table. * * * In setting that down the top flew back. He put her foot in the box. The snake was in the box and was alive. After he closed the box I took it back to the garage." As he entered the room he noticed Mrs. James move on the table. She was in a night-gown, her legs were bare. It was the left leg that was placed in the box. Hope said the time required for the entire operation was not more than three minutes. He immediately returned to the garage and after remaining there 15 or 20 minutes James brought him a water glass full of whiskey. He had some drinks with James. James asked him why he was so nervous and said: "She is all right. Drink this, it will steady your nerve." Hope replied that he wanted the key to his car; he wanted to get away. James brought him the key to his car. Hope put the dead chickens and the box with the [fol. 2651] snakes and a gunny sack in the car. Hope drove to his wife's apartment in Los Angeles but she was visiting friends. He drove to where she was and she and her friends got in the car (apparently Hope's car), and he followed her driving James' car to their apartment and Mrs. Hope then

got in the James' car. "Q. And then where did you *three* go? A. We drove toward Pasadena, stopped on the way, and she had dinner, drank some beer. We went over to this place (Snake Joe's) where I had purchased the snakes and returned the two snakes to this man." After leaving Snake Joe's the witness said he did not know where they did go. They started for the beach. On La Cienega, within a mile or two of Venice boulevard, he threw out one of the boxes containing a snake. The second box was thrown out along the roadway on Venice boulevard. He and his wife and the third party, if there was another party, called on friends and Hope went along to James' residence, reaching there about 1:30 a.m. He went to return him his car. He put the car in the garage and James came out. James had been drinking. He wanted to know of Hope what he had done with the snakes and where he had been. Hope got in the car and the two sat down. James put the bottle of whiskey on the seat and the two had a couple of drinks. He (James) cooled down a bit and said: "Those snakes are no good either. My wife is not even sick." Hope said, "Why didn't you take her to the *hospital*?" James said: "No, they will strike us both higher than a kite." Why Hope should have suggested taking Mrs. James to a hospital in frustration of the plot to kill her passes human understanding.

It appears from the foregoing colloquium, so far as it can be rationalized, that Mrs. James was in dire need of medical assistance for a condition brought about by an attempt to commit an abortion, and obviously not for a condition brought about by an attempt to take her life. The necessity for urgent medical aid and James' reply to Hope as to what would happen to them if the cause of Mrs. James' condition was revealed to medical skill, gives more than mere color, considered with other evidence which crops out a number of times in the case, to the theory that Mrs. James submitted to an attempt on the part of Hope and James to perform an unlawful operation in which death ensued and in their dilemma to avoid responsibility they carried her to the pond to give the appearance of death caused by drowning. That the autopsy physician had no thought of an attempted abortion and made no examination to determine abortion as a cause of death and made only a casual observation of the uterus from the abdominal incision, is patent from his direct examination. Some two or three

weeks later and after considerable evidence had been introduced tending to support the abortion theory the doctor was recalled in rebuttal and testified that he examined the uterus including the vaginal region. Asked if he found any evidence of an abortion having been committed he said he did not. He observed a fetus indicating a pregnancy of about six weeks. Asked on cross-examination if the presence of the fetus was not absolutely conclusive that an abortion had been committed his answer was "Yes, sir". There is obviously some error in the transcript or misunderstanding on the part of the witness as to the question. The presence of the fetus would only indicate that it had not been expelled or removed from the uterus but that fact alone would not prove that an abortion had or had not been committed or attempted. An attempt to commit an abortion frequently results in death. No examination was made [fol. 2652] as to the condition of the fetus inasmuch as the theory of drowning was accepted as final. There is no evidence to show that the interior of the uterus was examined. In fact there is no evidence to show that more than a casual or general observation was made. The doctor testified that an abortion may be committed by administering drugs, or by violent exercise, which would include manipulation of the body, and if an operation was attempted in any other way than by the use of instruments there would be no way of ascertaining that an attempt had been made.

After James had predicted what would happen if they had taken Mrs. James to a hospital, Hope said James "jumped up and said, 'I am going to drown her'." James then went in the house and Hope said he stayed in the car and at about 4 o'clock, after some two or three hours had passed, James came to the car and said, "That is that". He presently said to Hope, "Stay here a little bit and I will take you into town". At about 6:30 or 7 o'clock a.m. James came out of the house to the garage and said, "She has been dead since 4 o'clock. The house is all cleaned up and you will have to go in and help me carry it out". Hope entered the house and saw Mrs. James' dead body on the floor of the hallway. Her head pointed toward the front door and her feet toward the bathroom. James took hold of the upper part of the body and Hope took hold of the lower portion and James went through the door that led to the sidewalk. He said to Hope, "You will have to put her in the fish

pond", and Hope said, "I won't do it." He went back to the car and after four or five minutes James returned to the garage and handed him a bucket full of soiled clothes among which were a couple of Turkish towels. He saw a couple of pieces of rope, a red sweater and some tape. Three blankets were also put in the rear of the car. They started for Los Angeles. James said to him not to get excited or nervous, that he would take care of him when he got the money. He and James drove to Virgil and Bryne streets where James got out. He handed Hope \$30 and said that he would have to dispose of the stuff and get out of town. Hope put the bucket and blankets in his car and went to get his wife and found her eating breakfast. He took her to work and came back and put the stuff in the sack with the dead chickens and put it in the car. He then went for a drive, but didn't know where he was going. He left the blankets in his house and they were sent to the laundry with other soiled linen. All other articles he disposed of in an incinerator back of a drug store on South Vermont. He said he could not remember all the materials that were burned but he named a red sweater, and a couple of Turkish towels. There were other things but he did not know what they were. Hope was shown a piece of ordinary cotton clothesline rope and said it resembled pieces of rope he burned in the incinerator. One of the investigators in searching an old trunk that belonged to James and which had been stored or left in the garage or outhouse where his niece resided for quite a long while, testified that he found in the trunk cotton rope of the same type. Hope, upon being asked a second time how Mrs. James was dressed when her foot was placed into the box containing the snake, materially contradicted his former testimony, by saying that she was dressed in pajamas and house shoes. On cross-examination his answer to the question "How much of the foot was placed in the box", was "I don't know—the foot was immediately pulled out very fast". He thought James' hand clasped the calf of her leg. He withdrew the leg practically instantly. The foot was slightly above the [fol. 2653] snake's head.

Hope said he asked James how he was able to get Mrs. James on the table in the position she was and he said he told her that a doctor was coming out to perform an operation on her for pregnancy. This and other evidence strongly indicates that Mrs. James was seriously contemplating re-

lieving her pregnancy by artificial means. He told Snake Joe that the snakes were to fight chickens and dogs. That, he said, was what James instructed him to say.

After Monday, August 5th, this being the day Mrs. James was found lying in the pond, Hope says he did not see James for several weeks thereafter. He first saw him in the barbershop quite a while after August 5th. He was asked if he had a conversation with him. His answer was, "Oh, just the general topics of the day at that time. Yes; nothing was said about this."

A month after Mrs. James' death he saw James again at the barbershop and they conversed on the subject of the killing. He told Hope, so he testified, that he, James, would give him \$1,000, "if *we* testified that *we* saw Mr. and Mrs. James married". By *we* presumably he referred to Hope's wife. Hope said his answer was "No, I wouldn't do it." He saw James at a later period at his barbershop, the time he was unable to state, but it was some time after August 5th, as he dropped in the shop to get his hair cut. As James was finishing cutting his hair he slipped \$100 in his hand which was covered by the barber's apron. The shop was full of people. He said, "Don't remember anything about me, and I advise you to get out of town." Asked if he said anything else the witness continued, "He said, 'Don't try to give it [the money] back to me; somebody will see you, and you will get us all in bad.'"

A blue blanket, a pink blanket and a tan blanket which the witness testified were given to him by James and which he took together with soiled clothing from the James home on August 5th, were identified by Hope. R. H. Kirby, Mike Allman and Joe Houtenbrink, commonly known as Snake Joe, all dealers in and exhibitors of snakes and reptiles were called upon singly to stand and were identified by Hope. On cross-examination the witness admitted that he had read much of the testimony he had given before the grand jury and he had read his wife's testimony.

Continuing his testimony he said he kept the three Long Beach snakes in his apartment for two days and when James gave him the money for them he delivered them to his La Canada home. There appears to be some discrepancy as to the length of time he had them at his apartment. Evidently he had them for several days on his own statements. After delivering the three snakes he did not see James until two weeks thereafter, at the barbershop. The witness then

said that he delivered the snakes at James' garage "around the 5th or 6th of July". He said he was getting ready to move and he had to get the snakes out of his apartments. He was out of work and he moved to the James home to do some work about the place. Hope rather decried the suggestion that he was doing work of any great consequence or that he was on the place at the hours Mrs. James was there, during the day time. He admitted that he fixed a chicken coop, tightened a little wire and "raked around a clothesline". The other days he was there he said he came into town with James or with James and James' sister. He stayed at the home four or five days and Mrs. James was there two days of that period. She left to attend a dental convention in session at Long Beach and Hope left [fol. 2654] the day following her departure. He was at home on the day the landlord was removing hardwood to another place. Mrs. James was at Long Beach on that day. James' sister, Mrs. Eva Murphy, chief evening operator of the telephone company at Morris, Alabama, was visiting James and his wife during the time Hope was temporarily stopping at the James home. Lois Wright, James' niece was at the home on occasions. He saw and talked with James' sister several times while he was stopping at the James home. The landlord was also there moving flooring from the premises. Hope indicated that he took only his breakfasts at the James home but lodged there nightly, getting in late. On cross-examination he testified for the first time that James paid him \$100 the night he delivered to him the Ocean Park snake. This amount is in addition to the \$100 which he says James slipped into his hand under the barber's apron or cover while shaving him. On cross-examination Hope testified that he saw the snake strike the deceased in the lower region of the foot. The snake was coiled. Its head traveled but three or four inches. He heard no rattle. Mrs. James was dressed in a nightgown. Hope denied that he ever pretended to have any knowledge of medicine but said that James told Mrs. Murphy, James' sister, in his presence, that Hope did possess medical skill and he, Hope, made no denial of the representation. Continuing his answer he said: "And neither did I deny the name that he introduced me by when his niece was right there and knew my right name." This reference was to an occasion when he was introduced as "doctor".

Hope admitted that he had talked many times with seven or eight of the investigators, naming officers J. C. Southard and Scott Littleton, and others who were preparing the case and he had been taken by them to places associated with the offense charged and had eaten meals outside the county jail, and had also talked with the district attorney and the deputies in charge of the prosecution but denied that he had discussed what he proposed to testify to with anyone.

When Hope went to Kirby's to buy the first lot of snakes he told Kirby that the snakes were to be used for experimental and scientific purposes. As an aid to Hope in his scientific research Kirby gave him a small jar containing crystallized or dried, rattlesnake venom. Crystallized or dried venom is as poisonous as the fresh venom. Hope took the jar of crystals and put it in his suitcase and had forgotten about it, but when he moved to James' place it came to his mind in some way and he offered it to James and James said he "didn't want it", and rejected it. Asked what he did with it his reply was, "I don't remember what became of it. I may still have it; I don't know". At another time in his examination he said he gave it to James. This testimony further intensified the mystery in which the whole theme of the plot to produce death by resorting to the means of rattlesnake poisoning was enveloped. Hope said that the last time he saw Mrs. James alive was in the afternoon next preceding her death. He did not then speak to her and not a word was spoken in the house by anyone. He had been informed that she was pregnant. Not a word further in explanation of the circumstances in which he had seen her or the condition she appeared to be in or the particular place where he saw her on the afternoon preceding her death, was related by the witness. He testified that he did not know whether venom in crystallized form was or was not poisonous.

It was quite impossible to have Hope give a definite answer as to what James' condition as to sobriety was on the early morning of August 5 when he arrived or during [fol. 2655] the time he was at the house. He first said he concluded he had been drinking from the fact that he smelled the odor of liquor on his breath. He also said he and James took two or three drinks, not large ones, but he did not see James take any more.

From his statements as to what occurred at the James' home from 1 a. m. Monday, August 5, to 6:30 or 7 a. m. of that day, it may be inferred from some of the things he related that James appeared to have been affected by intoxicating liquor, and on the other hand he seems to intimate that he was not so affected. His testimony in this as well as in other respects is equivocal, as shown by the following excerpt:

"Q. Well when you saw him at 1:30 [this is when he first arrived at the James home on the day he helped carry her dead body to the pond] he appeared to be intoxicated to you, didn't he? A. I stated I didn't know whether he was mad [because of Hope's delay in arriving] or intoxicated. Q. And after he took the drinks with you, between 1:30 and 2 o'clock [a. m.] he appeared to be intoxicated, and not mad, at you, didn't he? A. Well, I wouldn't state that he was not intoxicated, or mad either. He didn't seem to be so mad then. Q. But he did seem to be more intoxicated, didn't he? A. Slightly, yes. Q. Did he appear to have been drinking when you saw him in the morning about 7 o'clock? [Objection to question overruled.] A. Well, I was so scared in the morning I don't know whether he was drunk, or not."

He said James seemed extremely nervous, but his speech "never was incoherent". Prior to this he said his speech was "very much shot". He didn't stagger while he was assisting him in carrying the body to the pond. James shortly thereafter drove him in the automobile to Los Angeles. The witness did not see James take a drink from the hour of 2 o'clock during the rest of the morning. They left at 7 o'clock. Hope says he was alone in James' automobile in the garage for some five hours or more, and gives no reasonable explanation for his long stay. He slept a part of the time surrounded by the horror of the scene from which he had both the means and opportunity of withdrawing.

Hope had done no work during the month of July except the few days he was engaged at the James' home. While doing this work he saw quite a few black widow spiders in the garage and in the hen-house and wash-house. (Black widow spiders as a secondary element in the case will later appear.) He said that during all the times that he had known James nothing had been said about killing his wife until the rattlesnake proposition was suggested by James.

a short time before her death. His sworn words are that he had no knowledge as to how Mrs. James met her death except from what James told him. In short, he plead guilty to a charge of first degree murder which carried with it the possibility of the imposition of the death penalty, a crime which he did not commit, or assist in committing. No reasonable contention can be made on the evidence in the case that Mrs. James died from being bitten by a rattlesnake. Hope testified on the trial of the case that he took no part in drowning her, and did not know except from James' ex parte statement that she had been drowned.

The foregoing summary substantially contains all of the testimony given by Hope, who occupies the irreconcilable inconsistent position, in which he has placed himself, firstly, of being at one and the same time an accomplice to the murder of Mrs. James and secondly, not guilty of the crime. Drowning is the only way death could have been criminally [fol. 2656] accomplished if his testimony is to be taken as sufficiently convincing to establish the fact for which it was offered. It is not seriously contended that the deceased died from rattlesnake venom, and the abortion theory is most vigorously combatted by the people. Hope's testimony is, in several instances, confusing as to the sequence and order in which certain acts were performed, notably as to whether certain acts were done on Sunday, August 4th, or Monday, August 5th, and lacks, in some instances, definiteness as to time.

Mrs. Edna Hope, wife of Hope, followed him as a witness. She testified that Hope called for her at the place she was working at 1:30 or 2 o'clock, August 3, 1935. Neither the place nor the nature of her employment is stated. He was driving James' car. They stopped at a lunch place and had lunch and resuming their journey, Hope finally stopped in front of a snake farm. Mrs. Hope stayed in the car. Hope took a box and went to the side of a barn. He and Snake Joe finally came to the car carrying a box which Hope put in the car. Hope then drove to Los Angeles and let her out. He telephoned, inferentially to James, and left. She saw him again at 7 o'clock or 7:30. He was, at this time, driving the Hope car. They had dinner and went to a show. She saw Hope the following morning at 9:30 or 10 o'clock, and they had breakfast together. They drove to La Canada in their car and parked the car a block from the James home. He told her to wait as he would be back

in half an hour. He came back to the car in fifteen or twenty minutes. They talked a few minutes and she drove to Los Angeles. She saw him again about 2 o'clock. He drove up to where she was visiting friends, in James' car, and honked and she came out. She followed him several blocks to the place where they lived and she then got into the James car and they drove to Pasadena where they had been the day before. She noticed some boxes in the back of the car. There was a bad odor about the car. Hope took a sack out of the James car and put it in the Hope car. She then parked her car and they drove to Pasadena and Hope got out at Snake Joe's and took a box inside and was there several minutes. He and Snake Joe came out and went to the corner and she turned and went down to the boulevard, honking the horn. Hope came out and they drove away. At La Cienega boulevard Hope threw out a box which landed in the weeds. No explanation or reason is given as to why he should throw two of his snakes into the highway. He had theretofore resold or exchanged other snakes to the dealers. At Venice, Hope threw out another box on Venice avenue, which had a glass top. They drove back to Los Angeles and had something to eat. Hope had an engagement to play cards. She said she went "over there with him", not designating the place. He took her home and left her. This was Sunday, August 4th. She did not see him again until about 8 o'clock the following morning as she was getting breakfast. She described him as appearing "white and jittery, and had been drinking". Hope took her to work and about noon he came after her and took her to their apartment. She saw a blanket wrapped around a bundle in the middle of the floor. There was also another blanket. She sent one of the blankets to the laundry with a bundle of their laundry. When she got back to the office Hope got out of the car and said he "had things to burn". She saw him place a bundle in the incinerator back of the "place". It appeared to be a gunny sack. She identified three blankets, including the laundered blanket which Hope [fol. 2657] had brought to the apartment. She told the story as above set forth to the district attorney's office before Hope was indicted. She wanted to help him all she could.

The above is a full resume of Edna Hope's testimony made as definite as to circumstances as it is possible to do. There is nothing in it to show that her curiosity was aroused as to Hope's mysterious trips to Snake Joe's pit, or to the

James home, or as to what was contained in the boxes or sack which he transferred from one car to the other, or as to the throwing out of the two boxes onto the highways, one of which had a glass top, or as to what caused the bad odor which she detected, or as to what the articles were which Hope burned in the incinerator. What significance the Turkish towels, blankets and other destroyed articles may have borne to the theory of death by drowning, or even to the rattlesnake theory is certainly not perceptible. It is readily perceptible that the burned articles would have been more likely to have afforded incriminating evidence of death caused by an attempted abortion, if death so resulted, than they possibly could have served as proof of death by drowning. Hope himself said the bed sheet was bloody, attributing to the slight cut on the toe.

Hope testified that Mrs. James was on her back with nothing on but a nightgown, raised above her knees, and her knees were projected slightly beyond the edge of the table. He was unable to definitely describe the method by which she was tied down other than to say the rope passed over her shoulders or chest. Her lower extremity was not fastened in any way to the table. Pieces of adhesive tape were stuck or posted over her eyes and her mouth. It is not understandable why a person preparing another for drowning would lash his intended victim to a table. But the theory of the prosecution is that he was preparing her to be bitten on the foot or ankle by a rattlesnake. Hope said her foot was thrust into the box very swiftly and did not go deeply into the box. In fact he testified that James held her limb not far from the ankle or calf of the leg as the limb momentarily entered the box. There is no accounting for the gown which Mrs. James wore while she was on the table or as to whether it bore any evidence of an illegal operation. Hope testified to intensive cleaning up which he said James did following the rattlesnake episode and the sudden change of plan from death by rattlesnake venom to death by drowning. Why there should have been any occasion for extensive "cleaning up" or for the laundering of articles of household or personal use and the burning of others has not been explained, and there is no apparent rational theory upon which these activities can be reconciled with either of the two theories advanced by the state. He testified further that the body was dry and there was no water on the floor, and the articles which were carried away were also dry.

when he entered the room. The foregoing is substantially all of the testimony that may be said to bear directly on the corpus delicti, except the testimony of the defendant, the only other possible witness to the act, which will later receive attention. The balance of the evidence is of an indirect character and consists of various circumstances, to-wit: the alleged confession, alleged statements made by the defendant and certain acts which the prosecution claim tends to establish the crime and connect the defendant with it, including the issue of motive.

It may here be said that it is not to be taken as any inclination on the part of the author of this dissent to vindicate or minimize any of the acts or conduct of the defendant which reveal moral depravity or perverse tendencies by anything said in the analysis of the evidence, but it is our purpose and our bounden duty, in all cases, under the mandate of the law, to dispassionately and carefully examine the evidence presented on appeal, as to its sufficiency and consistency, and give effect to the cardinal rules of criminal procedure which are the palladium on the preservation of which depend those guarantees of protection to life and liberty which the state vouchsafes to every person charged with a criminal offense without regard to the heinousness of the offense charged or the station of the person against whom the law's severest penalty may be invoked.

It may further be stated as an axiom of law that a conviction may not be had on the weakness of the accused's defense but it must rest solely on the strength of the case made against him. Mere conjecture, or suspicions, however strong, are not sufficient to warrant a verdict of guilty. Nor can the doctrine of chances, which is to say, that the chances are greater that the accused is guilty than are the chances that he is innocent, be permitted to usurp the office of substantial proof which must satisfy and convince the understanding to a moral certainty. If the evidence convinces the minds of the jurors that the person on trial is criminally responsible for a homicide, and a doubt exists as to the degree of punishment which should be imposed, their verdict must be in the lesser degree.

While it is not a circumstance, strictly speaking, which can affect the legal aspect of the case, it is nevertheless noteworthy that the jury was nine hours in deliberation—from

10:56 a. m. until 8:10 p. m.—before the verdict imposing the death penalty was consented to.

The defense base their arguments for a reversal on a number of grounds, the major ones being the inherent improbability and unreasonableness of Hope's absurd story, which, they claim, was fabricated by Hope under the tutelage of a large number of over-wrought investigators in charge of the prosecution. The defense's contention directed at Hope's testimony, is that before the testimony of a witness may be accepted as sufficient to sustain a judgment it must accord in the main at least with the normal conduct of persons responsible to society for those acts which are prompted by avarice, revenge, passions, and emotions which influence the average normal persons in doing deeds, good or bad. In those cases where the acts mark such a wide departure from the natural as to partake of the nature of the weird, extremely gruesome and inexplicably uncanny, and to stifle the application of the common rules of reason or logic, proof of the specific acts charged should be established by very substantial and convincing proof. The claim is made that out of the multitude of detached erotic and sordid acts put in evidence against the defendant, many of them must fail because they were not established by the convincing force which the law and reason require in such cases and that many of the misdeeds charged were not relevant or material to the crime alleged in the indictment and obviously the only effect which such acts could have had was to turn the minds of the jury against the defendant so thoroughly that his defense and all that was offered in his behalf would be discredited by the jury and the presumptions of innocence and the doctrine of moral certainty would be swept aside by a flood of prejudice-begetting accusations against which the defendant, under [fol. 2659] the law, was entitled to be protected. In this connection, it may be stated, that three incest offenses charged against the defendant as having been committed with one Lois Wright were investigated and carried along with the murder charge, which crime was alleged to have been committed some eight months prior to the investigation of the incest charges. The investigations were so connected that the officers in testifying as to the arrest of the defendant and alleged conversations had with him bearing on the murder charge, would and did bring to the jury's attention the fact that the defendant was also charged with,

if not then convicted, of the crime of incest. The incest charges were wholly separate from the murder charge and they should not have been injected into the murder case, especially by an officer of long experience, when testifying in the case. He too readily volunteered improper statements, and intentionally made reference to matters which were not responsive to any question propounded. It appears that the dictaphone installed in a house rented by the officers and adjoining the James residence and under the personal supervision of Officer Earl E. Kynette was the original plan adopted for the discovery of evidence to be used in the prosecution of the incest charges.

Among the several objections most strongly urged by the defense is one directed to the exhibition of live rattlesnakes. Others of like character are made to the exhibition of a dead snake enclosed in a glass jar, with open mouth and fangs projected from the upper jaw: Rattlesnake venom in crystal form, and fangs in the primary, secondary and third growths, and the manner in which they are attached to the upper jaw, and the method in which the virus is expelled through the fangs were exhibited and explained to the jury in much detail. The ways and habits, kinds and species, longevity in captivity, the manner in which they obtain their food, how and why they coil and strike, and the physical structure of reptiles of the crotalidae family and the excruciating pain the victim suffers as the subtle poison stealthily creeps through the circulatory system were meticulously discussed by naturalists, zoologists, entomologists and herpetologists, who had earned their degrees at venerable American and European universities. Three or four lay experts who had gained their knowledge of reptile habits from practical experience on the desert and in habitats where snakes are most abundant, added hundreds of pages to the record which could not have assisted the jury in the remotest degree in their consideration of the case.

Besides the snakes and their products which were put in evidence, photographs of the deceased, after the body had been exhumed, were also resorted to and a human skull was used to illustrate the manner in which the injuries may have been inflicted upon the head of Winona James in the Pike's Peak automobile wreck.

There is no doubt that photographs and exhibits are admissible for purposes of identification and by way of illustration when material and germane to the issues involved

but when they are not necessary or, from the nature of the subject under investigation, could not enlighten the jury as to the main facts in issue and are of such character as would tend to harrow the feelings or excite passion or prejudice in the minds of the triers of fact, they should not be received in evidence or exhibited to the jury.

The defense, naturally, protested against bringing into the courtroom a glass-top box containing two live rattle-[fol. 2660] snakes, and its exhibition to the men and women who composed the jury. Joe Houtenbrink, commonly referred to as Snake Joe, who operated a snake farm in West Valley boulevard, East Pasadena, was on the stand when the snakes were brought into the courtroom. The witness had testified that he first met Hope on August 3, 1935, at his place, No. 42 Cypress street, Pasadena. He sold him two snakes belonging to the diamond-back or Crotalidae Atrox family, for \$3.00. He repeated Hope's story of a bet he had made with a man who wanted to kill a dog, and if the snake would kill a dog he could win and therefore he wanted real hot snakes. He had a box, one side of which was glass, into which the snakes were placed. On the next day, August 4th, he repurchased the snakes from Hope. Hope said the Humane Society stopped him from having the fight. Snake Joe gave him \$1.50 for the two snakes. The witness was asked if he still had the same snakes in his possession and upon answering that he had, two men entered the crowded courtroom carrying a box containing two snakes (but one snake was in the box into which Hope said Mrs. James' foot was forced), which they deposited beside the bench. The following proceedings ensued: Mr. Clark, counsel for defendant, objected to the witness leaving the stand to inspect the box and making exhibition of any snakes to the jury. Counsel, in open court, requested the court by order or appropriate means to make or cause to be made a record "that two men have just entered the courtroom carrying a box covered with a burlap cloth, and upon their coming down the aisle, the people who were in the courtroom, filling the courtroom, manifested excitement; that several of them arose from their seats; that the attention of spectators and the jury was directed away from the testimony of the witness; that at the time I am speaking there is upon the faces of the audience an appearance of anxiety and consternation not heretofore exhibited during this trial." (Uncontroverted affidavits aver that the snakes

were sounding their rattles as they were carried down the aisle.) The court thereupon made the following statement: "The court has no knowledge that there was any such manifestation on the part of the audience. The court is unable to state whether the attention of any person was diverted or not, nor is there anything to indicate the apprehension that your statement implies; at least it has not been seen by me. Mr. Clark: In other words your Honor has no knowledge that the statement I have just made is correct. The Court: No. That may be your frank, honest opinion as to the facts, however, the Court has not seen any such situation. Mr. Clark: I will try to find appropriate means of putting those facts in evidence. I think they are facts and that my statement is appropriately made at this time. The Court: So far as the facts of the two men having taken the box in from the courtroom door and passed up the aisle between two groups of spectators, through the gate into the inner part of the courtroom and deposited the box by the side of the bench, the record may show that did occur."

Affidavits made by the attorneys for the defendant and which were not specifically traversed, were presented on motion for a new trial, containing averments describing the consternation, commotion and waves of terror which spread throughout the courtroom as the snakes were carried down the aisle, sounding their rattles, in the glass-faced box.

The snakes were received in evidence and exhibited to the jury against the objections of the defendant. Motions to strike on numerous statutory grounds were denied.

[fol. 2661] The witness said he never saw James before he saw him in court. In describing Hope's condition at the time he returned the snakes, he said, "He [Hope] had had a couple of drinks, is the way it looks, but he wasn't intoxicated. We had some drinks ourselves, I remember; went out and had a glass of beer together."

Roland H. Kirby, the Long Beach showman and exhibitor of reptiles of whom Hope purchased his first lot of snakes and from whom he received the jar of crystallized venom, in qualifying as an expert testified that he had had eleven years in research and experimentation work with reptiles and had lectured to classes in zoology and had attended experiments at different institutes in regard to the effects of snake poison. His knowledge was gained by reading and from practical experience. He said he had been bitten by a rattlesnake and spoke of the great suffering he endured

and described the effect the venom had on him personally. In his experience three out of ten persons who were bitten, died. He exhibited several rattlesnake fangs by way of illustrating his testimony. Counsel for the prosecution cautioned that the fangs were potentially dangerous even when detached from the head, and advice was given that they be carefully handled. He recalled Hope buying the three snakes. Hope at no time gave any reason why he bought three snakes instead of one. So far as his testimony goes only one was actually used. At no time did James tell him to get any definite number and he seemed to have used his own judgment in procuring snakes for whatever purpose they were to be used.

Mike Allman is the proprietor of a "reptile exhibit" situated at Ocean Park. The reptiles are confined in a pit 30 by 40 feet in which there were from 150 to 200 reptiles on the day James and Hope entered. He performs in the pit with the snakes and the audience views the snakes from the rim. An iron railing extends about the rim of the pit as a protection to the visitors. His memory was somewhat hazy as to when or how they came in but it seemed to him that they had had a couple of drinks and they got noisy, he said, "as people frequently do in this place," and he became annoyed. They insisted that he did not have a poisonous snake in his pit; that he had removed their fangs. He did not pay much attention to them as he was talking to other people. Finally James made an offer to bet him he didn't have a poisonous snake. He got sore and was going to bet him but he bluffed out. He didn't notice them any more and didn't see them when they left. His observation of them was certainly very fleeting. The next day Hope came back with a glass covered box in which he had a half grown white rabbit and he said James had bet him \$50 that he did not have a poisonous snake on the place; that he had lost to James \$100 playing poker and he wanted Allman to guarantee that the snake was poisonous and he would have a chance to win back one-half of what he had lost. Hope wanted him to "put the rabbit in the box and kill it, to show that it was poisonous." Allman refused to do this and said he could take the rabbit any place he wished and test it out. Hope gave him \$3 for the snake. The witness admitted that he had attended the trial and had heard Hope's testimony. The next time after the purchase that he saw James and Hope was in May, 1936, nine months after

said purchase. James and Hope were taken by a number of the investigators for the district attorney's office who had been active in the case and other officers to Allman's place [fol. 2662] for identification. Allman had not seen James, if ever before, since July, 1 35. He had no previous acquaintance with him. Allman admitted on cross-examination that the following questions were asked him, and the following answers were given by him when he appeared before the Grand Jury during the investigation of the murder charge. His answers were as follows: "Q. And did they have any conversation with you? [After entry into the exhibit.] A. Yes, sir; I was playing with the rattlesnakes, as I generally will do, making them strike, and working around pretty close to them, and they got an idea the way a lot of people figure those snakes are harmless, but we don't remove any fangs * * * Well, one guy, Mr. Hope—he was the one that was a little bit—wanted to argue about it. He says, 'Those snakes are not poisonous.' I said, 'Certainly they are poisonous.' 'Well,' he says, 'do you want to bet \$20.00 on it.' Something like that. I said 'sure', I will cover the bet.' Didn't you so testify before the Grand Jury, Mr. Allman? A. Yes, I did."

The witness acknowledged a later conversation which took place between him and James at Allman's in the presence of a number of officers at which time the following questions were asked and the following answers were given by him. "Q. And it is a fact, is it not, that you said to these parties [officers] that you could identify Mr. Hope, but you wasn't sure of James? A. Yes, sir. Q. You say you didn't say that? A. I did."

On re-direct, the witness said he pointed out James and Hope as the men who had been at the snake-pit. On recross, he said that when he identified them the officers had Hope and James in custody and they were separate and apart from the other people. He didn't then know James was in custody. The witness veered quite a bit through several questions and finally said that when he saw the group together he recognized James as a person who had been in his place but he did not know his name. He said he remembered James on account of making the argument as to non-poisonous snakes. He had previously testified before the Grand Jury, and his memory was fresher then as to the events than at the trial, that he remembered Hope because

of the poisonous snake argument he made. As a matter of evidence it was Hope who at the times he purchased snakes of the two other vendors stressed the fact that he wanted to be certain that his purchases were of the poisonous type and in one case used substantially the same language and methods as were used in effecting the Allman purchase. Asked if James did not request him to be careful as to his identification as it meant much to him, his answer was he did not recollect but he "guessed" James did request him to be sure of his identification. Asked if he did not say, "I think I saw you before, but I am not sure," he answered, "No, I don't think I said that. Q. Well, you did say something about thinking you had seen him before didn't you? A. No, I didn't say that either. Q. And yet you haven't the slightest recollection of what you did say? A. Not exactly, no."

Asked how James was dressed he said he thought he had on a dark suit but he wasn't sure. He didn't pay attention to clothes, he watched the face. Asked what the color of James' eyes were he said he paid no attention to his eyes. "You don't when you are in the pit." He was not able to describe the man's features or dress. He did not recollect whether he wore a hat, a cap, or neither.

[fol. 2663] Mrs. Ethel Smith, niece of defendant, testified that she and her husband, Raymond C. Smith, and her husband's father and mother, called at the James home Sunday afternoon at 5 o'clock, August 4th and found the back door locked. The shades were drawn and she could not see into the inner portion of the house. She did not knock or ring the door bell. She wrote the note found in the crack of the front door Monday evening by the Pembertons and James. The party remained fifteen or twenty minutes. Her husband and his father and mother walked about the grounds and picked some oranges and plums. She saw James on the following Wednesday at Viola Lueck's apartment. He said he found her note Monday and asked her if she was there Monday. She told him she was there Sunday. He asked her if she was on her vacation and where she went, and she said she drove up to Mount Wilson, and he said, he did, too, with Mary. He asked her if the officers were there to take names and she said no. James in explanation of the above conversation said that he did not recollect making the statement that he went up Mount

Wilson on Sunday, August 4th, but said that he was up the previous Sunday and the officials searched the car for firearms, and that incident was doubtless in her mind. If Hope's testimony is true, Mrs. James was alive on the Sunday the Pemberton party called at the James home. His testimony was explicit as to when her foot was forced in the box containing the snake, to-wit, Monday morning, August 5th.

On May 8th, Charles Griffen, a member of the investigation staff of the district attorney's office, went to Ethel Smith's house and took from an old discarded trunk belonging to James which was in the garage, and which James had sent to her home months before, a rope, which Hope testified was very similar to the rope used in tying Mrs. James to the table, heretofore described as an ordinary cotton rope commonly used for clothes-line purposes. James had moved from the La Canada home some months prior to this incident.

The only other testimony bearing upon the question as to the time decedent was last seen alive was given by Alfred Dinsley, a neighbor of Mrs. James. He lived at a distance of some four or five hundred feet of the James home but he was not personally acquainted with her. He had an impression of the general stature and appearance of a woman he had seen four or five different times on the James premises. He stored his laboratory apparatus in a shed which he daily visited. On Monday morning, August 5th, at 9:25 o'clock, he was carrying combustible garbage to a common incinerator used by himself and the Jameses, and as he passed near the James premises a pit bull-dog inside the James' gate began barking which attracted the attention of a woman in the chicken house on the James' property who came to the door about twenty-five feet distant from him, and "stared" him full in the face, half smiled and resumed her duty, and he went on his way. He described the woman as being mature, with blonde hair, and some five feet eight or nine inches in height. The witness would not make absolute identification that the woman he saw on the morning of August 5th was the same woman he had seen on the James premises on four or five previous occasions but she was of the same general appearance. He described her as being bareheaded and wearing a rose or rust-colored smock and her "stocking legs were visible to below her knees", and she was apparently wearing shoes. The color

of the garment corresponded to Mrs. James' rose-colored [fol. 2664] pajamas described by her friend, Miss Lueck. The garment was belted at the waist and was not of the pajama or divided skirt type. He could not tell whether the garment was open in the front or the back, or whether it was a pull-over. If Mr. Dinsley is correct as to his date and if the woman he saw in Mrs. James' chicken yard where the dog was evidently barking at him, a stranger, was in fact Mrs. James, and his testimony is very convincing that it was Mrs. James, then of course the story as told by Hope cannot be true. Hope testified that he helped carry Mrs. James out of the house, a corpse, hours before Mr. Dinsley saw the "mature blonde" woman whom he described as having seen on the James premises. Mrs. James was decidedly of the blonde type. The description of the blonde woman he saw in the James' chicken yard, and her apparel, and the fact that the dog near her was barking at him, a stranger, is convincing proof that the woman there described was Mrs. James.

Considerable emphasis was placed on the fact that Hope called at the barbershop at intervals of approximately three weeks and talked with James on terms of friendliness. The evidence is that there was nothing about his visits to cause comment or excite the suspicion of the employees. On one or two occasions he and Hope walked to a cigar store at the corner. The inference drawn from Hope's visits by the prosecution was that Hope and James were conspiring to kill Mrs. James. Their conduct, such as it was, was open and without attempt at concealment, and if Hope's testimony is to be believed, it positively negatives any contention that he ever ²was conspiring to kill Mrs. James. His acquaintance with Mrs. James had not existed longer than two or three months. His testimony is very definitely to the effect that he was not given a hint nor was any suggestion made by James that he was planning to kill his wife until a very brief time before he was directed by James on the early morning of August 5th to carry the box containing the snakes into the dining room. The vague and inane expression attributed to James weeks before, to the effect that the snakes were to be used as the means of killing the wife of a man who had an extravagant and "troublesome wife" raised no suspicion in his mind that Mrs. James was the contemplated victim. This definitely appears throughout his testimony, except as to one isolated instance, which he

fixes as having occurred Saturday, August 3d. On that day he was returning from Snake Joe's with two rattlesnakes. James joined him later, and on the way to their destination James, then driving, stopped at a drug store and sent him in the store to buy adhesive tape and to have the mystery prescription filled. His curiosity prompted him to inquire of the druggist as to the contents of the prescription, but the druggist refused to give him any information as to the nature of the compound. He made no inquiry of James, as to its use. James, with the rattlesnakes in the car, and prepared with adhesive tape and the mystery prescription, said to Hope that his wife had \$5,000 worth of insurance and he was going to collect it. This startling statement seemingly made no impression on Hope. James said nothing more and Hope asked no questions. This exhibition of mental lethargy baffles the understanding.

Lois Wright, James' niece, with whom James had been convicted on three charges, by means of the dictagraph installed by Kynette, of incestuous relations, was called by the prosecution and testified that she was working at James' barbershop beginning April or May, 1935. Her [fol. 2665] best recollection was that she first met Hope at her uncle's home, on a Sunday in July, 1935. Her aunt, Mrs. Murphy, was then at the James home. She had seen Hope at the barbershop on occasions. Sometimes he had barber work done and sometimes he sat in a waiting chair and talked with Mr. James. She had seen them walk out of the shop and around the corner, perhaps twice.

Sam Grant, a barber in the employ of James, called by the prosecution, said that he had seen Hope in the shop getting work done. He was a regular customer. He and James engaged in casual conversation. He had seen them talk in front of the shop on one occasion for a little while. He had seen others also converse with James in front of the shop. Hope was at the shop about every three weeks both before and after Mrs. James' death. No association is shown to have existed between Hope and James as to any unlawful enterprise, save the testimony of Hope, and the alleged confession.

A witness who gave assistance to the bureau of investigation and the police force, and who doubtless had considerable to do with convicting the defendant, was Mrs. Madge Reed who said she was living at an apartment house apart from her husband. While Mrs. James was attending the

dental convention at Long Beach, James at about one o'clock in the afternoon of July 10th, went to the Italian Village for lunch and while there met first a girl friend of Madge Reed who introduced him to her. She did not state the name by which he was introduced. They had something to drink and James became so far affected with liquor that he asked the girl friend to drive him home in his car. He told them he was from Kansas and was on a visit and lived with his sister on Verdugo Road. Whether he gave his true name or a fictitious name is not stated. The girl friend's name, after directions from the court to do so, was given as Merryl Barrows. The witness said she did not know her address or the street on which she lived and she had forgotten her telephone number. She had met her friend only once before at the village. They got into James' auto at about 5 o'clock. The girl friend drove the car to Western avenue and got out and Madge Reed drove to the James home and upon entering the house James said he was going to sleep and went into the bedroom. He gave her one dollar and told her to take the car and get her dinner and when she returned he would be able to drive her into Los Angeles. When she returned from dinner James was still sleeping. In a short time Mrs. James, who had returned home in advance of her return schedule, entered the house. When she came in the door, she "hollered, 'Oh, honey'", doubtless as a salutation to James. This exclamation of Mrs. James was stricken as hearsay. We think it has significance and should stand. Mrs. Reed was not acquainted with Mrs. James. Mrs. James, after a time, took her to a 'bus connection where she took passage to her home. The witness said she did not see James again until August 11th, five days after Mrs. James' death. Mrs. Reed said James called her up by 'phone on numerous occasions, the first time being the day after she was at the James' home. He apologized for taking her to his home. He didn't think his wife would be home as she was attending a convention at Long Beach and was not expected home for three days. He asked her to go to San Diego with him. He called her up the Saturday before Mrs. James' death, which would be August 3d. He suggested that she get a girl friend and the four would go out together. The name of the fourth party [fol. 2666] was not given by the witness. She did not hear from him again until August 11th, when he called by 'phone

and asked her if she had been reading in the newspapers about his wife's death and she replied she had. He wanted to talk to her about what she had seen in the papers and wanted to go to her apartment, 525 South Coronado avenue, and she told him he "could not," but "he came up anyway." He told her about his wife and "how they were trying to frame him on the case; that as long as his wife was dead that he would collect the insurance and he would marry me and take me north." She left the apartment with him for a ride. He told her that if he was indicted he wanted to spring her as a surprise witness and he would give her \$2,000 if she would testify. He wanted her to testify that she had met him and his wife five weeks previous at the Italian Village in the evening; that on the morning of her death she [witness] was out riding and she saw her standing on the porch and "she explained that she was not feeling well and that she had on yellow pajamas and she laid in the hammock and mentioned she had a sore on her leg." At this point it may be pertinent to call attention to the fact that Mrs. James died not later than August 5th. An autopsy was performed on August 6th, and it is not probable that the funeral was held earlier than the second day after death. This would bring the time to August 6th or 7th. The autopsy showed drowning as the cause of death and there was no occasion to anticipate an indictment as the coroner's jury made no accusatory report and so far as the record shows there was no reason to fear criminal proceedings would be instituted and as a matter of fact no charges were made or indictment found until the dictaphone had been installed and a system of espionage had been adopted months afterwards which resulted in the incest and murder charges.

It will be recalled that the first time Dr. Wagner, the county autopsy surgeon, had any intimation that rattlesnakes had played any part in the death of Mrs. James was months afterwards and it was brought to his notice by one of the investigators. No suspicion that she had met her death by criminal agencies was given a thought until months afterwards as evidenced by the time that the body was exhumed for examination some nine months later. It does not seem probable or reasonable that James would have been discussing with Madge Reed the probability of an indictment five days after his wife's death in view of the

autopsy surgeon's record and the slow progress made in developing the case. Continuing her story she said she and James had left her apartment and went to a room in a Hermosa Beach hotel. On the way they stopped a number of times for Mrs. Reed to make telephone calls. They registered (her handwriting) at the hotel. He talked about his troubles and she being a witness for him. He talked about insurance and said it was 'a marvelous thing' to have and that they were trying to "frame" him on that point. She spent the night in the hotel and left the next morning for Los Angeles. On the way back he had her take notes so she would be advised as to what to say when she met James and his wife. She took Mr. Silverman's name (James' attorney) and phone number. The witness produced a card on which she made certain notes in James' presence. She said he gave her \$60 to show that he really meant business. She added: "I was to get \$2,000.00 whether I testified or not." The written matter on the card was done by her in ink and contained names and addresses. She got the card at the hotel where she said [fol. 2667] she and James stayed the night before. The writing was done while she was en route to Los Angeles. Upon arriving in Los Angeles she took a taxi for her apartment.

She was then passed for cross-examination. She knew nothing as to the whereabouts of her girl friend. Her girl friend brought James to her table at the Italian Village and introduced him to her and they had a few drinks. James said he felt he had had too much to drink and they consented to drive him home. On a Hermosa hotel registration card she wrote, on James' instructions, the names "Mr. and Mrs. Joseph Wright, San Francisco, California." She and James were shown a room by the man at the desk. They walked upstairs to a room but she didn't know what floor it was on. She had no baggage of any kind. They talked most of the night. She did not have any improper relations with James. Before retiring she took off her outer dress, shoes and stockings. She did not remember whether James disrobed or not. When she fell asleep James was sitting up talking. Asked if James went to bed she replied that she did not think it necessary to answer the question, and when instructed by the Court to answer, she answered, "I don't know." She said they were back in Los

Angeles before eight o'clock the next morning. She admitted that she had lived at Wenatchee, Washington, and Salem, Oregon. She denied that she had had "some experiences" at Salem, Oregon. An objection was sustained as to whether she knew a dentist residing at Salem, Oregon. Her friend, Vera Russell was living with her at Los Angeles and paying some of her expenses. She had no idea where she could be found. The witness admitted she had dropped into James' barbershop but said she could not remember the time. She said she had no recollection of seeing Lois Wright at the barbershop. She denied that she asked for and received money. This denial had reference to testimony given by James that she called at his shop the first or second day after July 10th, and claimed that she was out of pocket on account of taxi fare and other charges incurred by reason of driving James to his home, in the sum of \$10, which James said he paid to her. She was then asked if she visited James' shop before or after the death of his wife and her answer was, several months afterwards. She visited his shop after he had called her at a time when her mother was dying and she did ask him for money to visit her. To the next question she answered she talked to him on the 'phone. She further testified that inasmuch as she had given him the impression that she would commit perjury for him, and inasmuch as he would pay her whether she testified or not, she thought he "owed her this money." Asked as to whether she did not tell him that unless he gave her some money she would go to the newspapers and attempt to sell her story, her answer was, "I don't recall." She testified that just before the insurance trial in November, James offered her \$100 to testify at that trial. Asked when was the last time she called at the barbershop, her answer was, "I don't recall." The only money she claimed to have received from James was the \$60 he gave her on the morning following the night they sat up the greater part at a Hermosa Beach hotel.

Mrs. Madge Reed offered not a person in corroboration of her story and none was given save the admission of James as set forth in his testimony recounting meeting her at the Italian Village, situated on 8th street, near Hill, in the same general locality as James' barbershop, No. 522 [fol. 2668] West 8th street. Mrs. Madge Reed's testimony has been set forth as it appears recorded in the case. James

admitted that he met Mrs. Reed one afternoon at the Italian Villiage where he went for lunch. His wife was attending the Long Beach convention. He said he was not feeling good and he drank some cocktails and stayed at the place until five o'clock and was somewhat under the influence of what he had drunk. He met Mrs. Reed, a stranger, and her friend, and after taking the cocktails he asked her if she would drive him home as he did not want to drive the car and she consented to do so. James said he went to sleep on the way. When he woke up at home, which was about midnight, his wife was bathing his face. Mrs. Reed came to his shop a day or two afterwards and said he had promised to give her \$10. She said his wife came home while she was there and took her to a 'bus line but she took a taxi which cost her \$3 and she had spent other sums and he owed her \$10. He gave her \$10. James testified that he never stayed all night with her at any time or place; he never saw her again. He denied promising her \$2,000 or any other amount if she would testify in his behalf in the event he should be indicted. She called him by 'phone on several occasions and wanted to borrow money. She stated her mother was dying in Australia and she had to have \$75 to go to her bedside, and he told her he didn't have it. She then began writing him letters—three in all, and in her last letter she demanded \$250. As a threat she wrote him that she had a story for which she could get twice the above amount for publication in the newspapers, but she didn't want the notoriety and preferred to sell it to him. Much of his testimony she either admitted or evaded by saying she did not remember. She said she could not recall whether she threatened him with the sale of her story for publication unless he gave her money.

Several of James' employees who were in close personal contact with him during working hours immediately following the all-night drunken episode related by Hope in which rattlesnakes were tried and discarded as instruments of death, and drowning was substituted as a more effective method, were called by both sides to show the physical and apparent mental condition of James as he appeared at work the day on which Mrs. James died. Without exception, all testified that he arrived at the shop on each occasion at the usual hour, did his work in his customary way, appeared normal and no one detected the odor of liquor on

his breath or observed the slightest evidence of intoxication in any respect. August 3d, the day Hope testified he brought in the second or third lot of snakes as herein related, which was Saturday, James was busy in the shop, and took but thirty minutes for lunch, paid off the help and closed the shop at the usual hour.

This brings us to a consideration of the question of motive which has as its foundation the life insurance policies issued upon the life of Mary James, in which he was the named beneficiary. Motive is an important factor in criminal cases, the degree of strength being relative to the facts and circumstances which make up the particular offense charged. Motive without substantial evidence supporting the incriminatory acts is not sufficient to sustain a conviction. In almost every crime a motive or an advantage to be gained by the perpetrator, patent or discernible, may be shown as an urge for the commission of crime. In the instant case it is contended that the motive was the enrichment of the defendant by the death of his wife.

[fol. 2669] The defendant met Mary Busch, who was a beauty parlor operator, in early March, 1935. He had a beauty parlor stall or parlor, installed in the rear of his barbershop and she was placed in charge on a salary basis. He and Mary soon began keeping company and finally they assumed the relations of husband and wife. James, during this period, had pending in the superior court an action to annul a marriage consummated with another woman. The decree annulling said marriage had not been granted at this time, and he was awaiting the action of the court. He said he and Mary were fond of each other and had agreed to marry as soon as all legal obstacles were removed. The decree of annulment was finally made and they were married at Santa Ana, Orange county, July 19, 1935. Before the legal marriage they had been living together under a mock ceremony. The man who performed it was not a person authorized to solemnize marriages. James testified that inasmuch as he and Mary had agreed upon marriage, in order to give color to a marriage status and keep down talk or gossip, he had the mock ceremony performed. Mary did not know it was a mock ceremony at the time. A valid ceremony having afterwards been performed, there can be no doubt she knew in advance of the valid ceremony that the first was not valid. During the period when they were

living together following the performance of the mock ceremony some of the policies were written on her life. That James was an open advocate of life insurance is proved beyond question by the testimony offered by the prosecution. He talked insurance openly. The several agents who had been his shop customers for long periods of time admitted they had frequently solicited his assistance in discovering and interesting suitable "prospects" for life insurance investments.

The earliest negotiations for insurance on the life of Mary James was had with Louis Berry, agent of the Mutual Life Insurance Company of New York. Mr. Berry testified that he had been soliciting James for insurance since he had become his customer, for about ten years. This was also true as to several other agents. In April, 1935, he told Berry that he would not be personally interested but he knew a girl that would be interested. He declined to give her name until the prospect was ready. The subject was brought up two weeks later in his shop by Berry, and James enquired the cost of a \$5,000 policy on a twenty or twenty-five years endowment plan. The result was that James, after being solicited several times, called from the rear of his shop Mary Busch whom he introduced to Mr. Berry. Mr. Berry and Mary Busch left the shop together and talked over the insurance proposition without the presence of James. On May 7, 1935, Mary made application for a \$5,000 policy in the Mutual Life Insurance Company of New York. A week before the application was returned James told Berry that the proposition was a little higher than one offered by the Prudential Life Insurance Company. Satisfactory terms were finally agreed on and she took the usual medical examination. The document was sent to New York and the company later asked for additional information which indicated that the issuance of the policy might be doubtful. After a delay of more than a month, however, Berry received and delivered to Mrs. James a \$5,000 three-year premium term policy.

James, no doubt prompted by his recent experience as to the necessity of strict compliance with the rules governing insurance applications, on July 29, 1935, ten days after [fol. 2670] marriage, called the agent by telephone and enquired whether the validity of the policy was affected by reason of the application describing Mrs. James as a mar-

ried woman at a time when she was a single woman. In her application she had classified herself as a married woman and named her estate as the beneficiary. James explained the marital predicament in which he and his wife had placed themselves and the agent took the matter up with the main office, and after more delay which provoked some complaint a policy was issued in which James was made the beneficiary. She told the agent she had married since her first application, and the agent wrote in the name of her husband as the beneficiary at her directions. The policy was delivered by Berry to James at the shop on August 5, 1935, after the death of Mrs. James. Berry frequently enquired as to Mrs. James' health and was always told by James she was doing nicely except on one occasion early in July he said she was not well, and inasmuch as she had a health policy she was going to become fully restored to health before returning to work. No claim was made for sick benefits. The first annual premium, amounting to \$59, was paid by Mary Busch.

Berry had no conversation with James after his wife's death for quite a few days. James did not return to his shop for several days after her death. He asked the agent several times thereafter if the company was going to pay double indemnity in accordance with the finding of the coroner's jury, that death was caused by accident.

Berry testified that James had done his barber work for a number of years and had given him the names of many insurance prospects. He further said he had talked with Mrs. James with respect to the policy, both in and out of the presence of James.

Max Galatz, representing the Occidental Life Insurance Company of Los Angeles, one of the companies that brought an action in the superior court to cancel its policies, to which James cross-complained, testified as to two applications for policies made by Mary Busch, one a health and accident policy, in the sum of \$700, and the other, a life policy in the sum of \$5,000, on which policies were issued on her applications in the latter part of May, 1925, before marriage. The agent solicited Mary Busch in the beauty shop and had never been in the barbershop before and was a stranger to both James and Mary Busch at the time he began to interest them in insurance investments. His testimony is confusing in some particulars and discloses much uncertainty as to the substance and the order of events.

He testified that he never had any conversation with James before he obtained the applications and both were obtained on the same day. Four or five days previous to the time of taking the application he met Mary in the beauty shop and had a conversation with her. James was not present. He was next asked: "Q. Was the defendant there at any time when you had a conversation with her [Mary Busch] before you actually got the application. A. No." He said he had a slight conversation with James during the interim from the delivery of the application to the issuance of policy. After the \$700 application was completed, James, in the presence of Mary, said, "Will you insure her?" The agent's answer to this question is unintelligible. The thought attempted to be expressed seems to be that he told James it was necessary for him to have insurance in his own right over and above the amount provided in the policy [fol. 2671] in which he was beneficiary. The agent filled out the application form in his own hand in the presence of Mary Busch, and he asked James if he was the husband and Mary if she was the wife and each answered, "Yes." He told James, hoping, he said, to write him a policy in the amount of \$5,000, that it would be absolutely necessary for him to have a greater amount of insurance on his life than he was writing for Mrs. James. James told him he had plenty of insurance. After instruction from the head office he went to James' barbershop and wrote a policy on his life in the sum of \$3,000. The policies were delivered to James at a restaurant near his shop. The premiums were paid on each policy. 2

On cross-examination the agent testified that the first time he was in the shop was the time he called on Mrs. James in which he discussed health and accident insurance with her. James testified that the first time he ever saw Galatz was June 2d. He was cutting his hair and Galatz overheard Mrs. James ask Berry when her policy would be issued and Berry said he would be surprised if the company did not turn it down. As soon as Galatz got out of the chair he went into the parlor and began soliciting her for her insurance. This statement finds corroboration in the evidence. Galatz said he never discussed life insurance with Mrs. James. Answering the next question he said he discussed it with James in her presence. He was asked if he ever "discussed the subject of life insurance with Mrs.

James, regardless of who was present," and he answered, "Yes." Following this he said he wrote her policy after talking to her and James; that he procured from her directly all the information attached to the \$5,000 policy; all the answers to the questions were obtained from her directly. The witness being asked if he did not say to Mrs. James at the time he solicited her insurance, knowing of the delayed Mutual policy, that the Occidental, having its home office in Los Angeles, could deliver insurance much more rapidly than other companies, answered, "No." He did not recollect whether he told her the rates of his company were less than others or that she could save money by taking a policy in his company. He said he did not know of the delay encountered in issuing the Mutual Life Company. The witness denied that he ever discussed with James the subject of the payment by his company of the life policy but finally admitted that he did say to James, after Mrs. James' death, "What are you going to do about this insurance?" The company had refused to pay the face value of the policy and one of the grounds of refusal, it appears, was that the assured did not pay the premium. The agent testified that Mrs. James paid the health and accident premiums but James paid the premium on the life policy. All premiums were paid in the shop in the negotiations of the three parties and the agent based his statement that James paid them on the fact that James took the money out of the cash register. He could not say definitely that James did not hand the money to her and she in turn passed it to him. There is no doubt but that the policies were issued because of the active solicitation of the agent.

Gene Waddle, unit manager of the Occidental Life, one of the companies contesting payment, testified that James called him by 'phone and he afterwards called at his shop. James said he wanted to talk with him and asked him to walk up the street with him and he followed him into a lavatory in the rear of a liquor store and asked him if he knew Mrs. James had insurance with his company. Upon being told that he did, James said he was anxious to learn and his [fol. 2672] attorney had asked him to inquire, what would be the status of his wife's policy, if issued out of wedlock. James explained they had planned on marriage but Mrs. James had been called to Long Beach on some dental work, which delayed the marriage, but they had since married.

No special significance is seen in the lavatory incident. It would be but natural that a policy holder or a person interested in a policy would care to know whether the existence of the circumstances above recited would render it void. The fact that a lavatory served as a place of privacy does not give any greater sinister significance to what was said than if the information sought had been given in the private office of the insurance company. There was nothing discussed that was not a matter of record, or was not known, or was not easily accessible to the insurance company's agents, and which would have inevitably developed upon the death of the assured. The information sought was as to the legal effect of admitted facts. James had asked the agent of the Mutual Life by telephone communication a similar question ten days after the ceremony was performed.

It will be recalled that the Mutual Life Policy had not been delivered to James, tested by Hope's testimony, at the time the act of destroying Mrs. James' life was commenced and fully accomplished. According to Hope she was dead in the early morning hours of August 5th. The policy was delivered (agent's testimony) at the barber-shop on August 5th. Of course, it was not delivered at the unseemly hours of 1:30 or 2 or 3 o'clock on the morning of August 5th. It was conclusively shown by the direct testimony of the agents who solicited the policies of insurance in which Mrs. Mary James was the assured that she was an active participant in procuring the same and herself suggested her husband as the beneficiary or consented thereto and there is no evidence of any coercion or over-persuasion on his part to induce her to name him as her beneficiary. There is evidence to the effect that he did introduce her to certain agents who had habitually importuned him to give them the names of prospective insurers, but her name, according to the agent's testimony, was given only after he had first obtained her consent.

There is no evidence in the record to indicate that James exercised any undue restraint over his wife. In fact, the evidence without conflict, is the other way. She seems to have come and gone as she pleased, and in every sense was a free agent. Her visit to Long Beach for several days, a very few days prior to her death, and her unexpected return home on account of her condition, and her visit to

her doctor's office and his call at her home, and her activities at the beauty shop and free intermingling with the public, and her association with friends, positively rebuts any implication of undue domination over her acts or volition by James.

The insurance companies refused to pay the sums stipulated in the policies and brought an action to cancel the policies. A cross-action was filed by James to recover double indemnity amounting to the sum of \$21,400. All actions were finally dismissed by the payment of the sum of \$3,500 to James.

The circumstances bearing on the death of Winona James, a former wife of the defendant, and the issuance of the policies on her life in which the defendant was the named beneficiary, are correlative issues to the Mary James transaction. Winona James was found dead in a bath tub in the cottage occupied by her and her husband, October 14, 1932, at Manitou, Colorado. The parties had set out soon after marriage for a visit to James' former home near Birmingham, Alabama. They went by way of Colorado Springs where [fol. 2673] they were to stop and negotiate the making of a lease of lands belonging to Mrs. James' parents to a tenant. While there they took the trip up Pike's Peak where the automobile disaster occurred which resulted in injuries to Mrs. James. Three weeks later she was found drowned in a bath tub at her home.

Mrs. Winona James was formerly a school teacher and latterly an accountant in an automobile business.

Evidence was admitted over the objection of the defendant tending to prove that the automobile incident which occurred in the jurisdiction of the state of Colorado approximately three years prior to the crime alleged in the instant case, and which resulted in serious injuries to his former wife, was caused in an attempt on the part of the defendant to take her life which purpose was finally accomplished some three weeks later by defendant causing her to be drowned.

The theory adopted by the prosecution in the instant case is framed and patterned after the theory announced in *People v. Gosden*, 91 Cal. Dec. 573, decided and published a short time before James was formerly charged with murder. The facts in the two cases are similar in some particulars and unlike in other particulars which have to do with the principle or theory upon which evidence of

another or other crimes are provable against a defendant on trial for a specific offense for the purpose of showing motive, intent, knowledge, absence of accident, or common plan or design. In the Gosden case the defendant's first and second wives, respectively, died from the administration of strychnine, a subtle poison. Defendant's knowledge of the effect of strychnine poison on the human system and the purpose or intent with which it was purchased by him, he, Gosden, claiming it was purchased for the purpose of exterminating rats, became important questions. There also existed a close similarity of the circumstances which attended the deaths of both wives. We held that sufficient reasons existed to justify the admission of proof as to criminal responsibility for the death of the first wife upon the trial of having murdered the second by means of strychnine poisoning.

In the instant case the theory of the prosecution was that James planned to kill his wife, first by procuring a rattlesnake and causing her to be bitten by it, but before its poison had accomplished his purpose he caused her to be drowned. As to the Colorado case the theory was that she was first made intoxicated, then hit on the head with a hammer and in an unconscious state abandoned to physical destruction in an unguided automobile sent dashing down the narrow, tortuous and precipitous Pike's Peak road. The motive attributable to each defendant is identical. The cause of death of Winona James is admitted to be drowning. The death of Mary James is claimed to have been caused by drowning. Both deaths are claimed to have been accomplished by the criminal acts of the defendant.

The cases which support the pronouncement that all that is necessary to admit proof of another crime where guilty knowledge or mistake or general plan or fraud or intent are the essence of the offense, is that a *prima facie* case be made out or that substantial evidence be given and there need be no showing beyond a reasonable doubt that the defendant committed the other crime, are not here questioned. In order to justify the admission of this character of evidence it should be of sufficient probative force to create a reasonable belief in the minds of the jurors that the other crimes were committed and the defendant committed them. [fol. 2674] Such evidence cannot be admitted if in character it is so vague and uncertain as to create suspicion only.

The suggestion procedure in some jurisdictions is that the relevancy of the offered proof should first be determined by the trial court upon offer made or by inquiry of the prosecuting attorney before the evidence is allowed to go to the jury. Vague and unsubstantial evidence of the commission of other crimes is clearly not admissible. (State v. Hyde, [Mo.] 136 S. W. 316; State v. Meininger, [Mo.] 268 S. W. 71; Bell v. State, [Ind.] 195 N. E. 274; State v. Howard, [Vt.] 183 Atl. 497; State v. Jones, [Wyo.] 191 Pac. 1075; Sneed v. State, [Ark.] 219 S. W. 1019; Lund v. State, [Ind.] 190 N. E. 850.)

The court is duty bound to carefully exclude all evidence as to other crimes not relevant to the main issue and which would only tend to degrade or defame the defendant or in anywise prejudice the jury against him.

The admissibility and sufficiency of the evidence admitted to prove that the death of Winona, which occurred in the State of Colorado in 1932, was accomplished by the felonious and premeditated act of the defendant, waiving the reasonable doubt doctrine, depends upon the further question as to whether it satisfied the rule which provides that such evidence cannot be admitted if in character it is so vague, uncertain or unsubstantial as merely to create a suspicion of guilt. Defendant further objected to an offer of proof of the other alleged crime claimed to have been committed in another jurisdiction distant more than a thousand miles from the place of trial and invoked the common law and statutory rights which vouchsafe the rights of an accused to be tried in the county in which the crime was committed. The ancient right cannot be denied in a case where punishment is to be imposed for the specific offense charged in the indictment or information. The right does not exist where the evidence of another crime is limited in its probative scope and effect to the purposes heretofore defined. The appellant complains that great distance from the situs of the offense deprives the accused in many cases of the means of discovering evidence material to his defense and, in effect, amounts to a denial of the process of the court to compel the attendance of witnesses in his behalf. (Cal. Const., art. I, sec. 13.) The point urged is illustrated by a matter which arose at the trial of the instant case. J. D. Rogers, the superintendent of Pike's Peak Auto Highway, a private enterprise, was brought

from Colorado as witness on behalf of the state. He testified that, upon his arrival at the scene where Winona James was injured and in attempting to ascertain whether she was breathing, he placed his head near her mouth and detected a strong odor of liquor on her breath. This evidence furnished support to the prosecution's argument to the jury that James had made her drunk before the automobile crash. This evidence would not have ordinarily been anticipated by the defendant in advance of trial, a contingency which frequently arises in the trial of cases. The appellant brought to the court's attention the fact that a letter had been recently delivered to him at the county jail, written by a party or parties in Colorado, outside the jurisdiction, who met and talked with Mr. and Mrs. James at the top of Pike's Peak a short time before they started down the mountain stating they could and would testify that there was no evidence or indication that either Mrs. James or James was affected by liquor. It appears from the discussion between court and counsel that the named party volunteering the information by letter and counsel for defense were acting in good faith in the matter and counsel, in [fol. 2675] asking the process of the court to produce the evidence by deposition or otherwise, was not derelict in disclosing the information. A continuance was moved that the deposition of said person might be taken to show that Mrs. James was sober and in a normal condition a short time before she received said injuries. No formal motion having been made by way of affidavit, the court denied the motion for a continuance for the purpose stated. The motion was renewed when the assistant district attorney in his argument severely arraigned the defendant for preparing his wife for death through the means of intoxicating liquor. It is so obvious as not to require more than a mention of the proposition that, in circumstances where the means of communication or opportunity for investigation and preparation for a defense and all the other recognized advantages which local contacts afford, are made difficult or inaccessible to the person placed on trial for a crime committed far distant from the place of the trial, every opportunity should be liberally extended to enable such person to meet any surprise evidence or unforeseeable situation arising at the trial, even at the cost of a continuance. The importance of the testimony of the two Colorado persons who offered to testify in rebuttal of the Rogers' evidence as to

the sobriety of Mrs. James is given added emphasis by the prominence this court has given the issue in its opinion herein as well as that given to said issue by the prosecution in argument to the jury.

We have heretofore referred in general terms to the evidence which the prosecution holds to be sufficient to support the implied finding of the jury that the other charge of murder was committed by the defendant. As briefly as possible we will further consider the circumstances from which the prosecution draws inferences which it claims satisfy the rule as to proof of other offenses and which, considered with the evidence relevant to the main case (limited to the purposes prescribed by law), constitute sufficient proof of defendant's guilt beyond a reasonable doubt.

Winona P. Wallace and James were married in July, 1932. She had been a school teacher before her marriage and later a bookkeeper for Howard Automobile Company. In 1932 C. A. Pries was engaged in selling insurance for the Prudential Life Insurance Company. He had been an acquaintance and friend of James and a regular patron of his barber shop for many years. Through the years he had suggested to Pries the names of persons who might become interested in the Prudential Insurance Company's plan of insurance. He had bought policies in his own name and had had a policy issued on his mother's life in the sum of \$500 in which he was the beneficiary, long before Winona Wallace was thought of as a policy holder, and had advocated life insurance to others as a business investment and had advised an employee to consult Mr. Pries in matters of insurance. Some three or four weeks prior to May 20, 1932, he had talked with Pries as to a prospect he had in mind. He also had discussed insurance for himself. In keeping with his agreement, he invited Pries to his apartment where he met the insurance prospect, Miss Wallace. After discussing terms he (Pries) wrote an application for James in the sum of \$5,000. After that transaction was completed James suggested that Miss Wallace take a like policy. Pries transacted all of the business connected with the Wallace policy with her. She answered all questions and paid the premium and James did likewise as to his policy. Pries advised the double indemnity policy, inasmuch as it was only one dollar more per thousand than the [fol. 2676] rate charged on straight accident insurance.

When the naming of the beneficiary was reached James said that he and Winona were to be married within a month or two and asked if that fact would affect the naming of himself as beneficiary. The agent told him it was necessary that he should have a beneficial interest in the insured but the beneficiary could thereafter be changed. Miss Wallace's estate was made beneficiary and after marriage James was made the beneficiary. The change was executed by the insured. Both policies were personally delivered to the parties who caused them to be issued. Miss Wallace also carried a policy in the sum of \$1,000, issued in 1924 by the Kansas City Life Company, in which her sister was the named beneficiary.

James testified that, after marriage, a salesman, representing Policy Holder's Life Insurance Association, called at his home and talked over with his wife a stockholders' insurance proposition which issued a \$3,000 policy at the rate of \$15 per thousand annually and, after talking it over, both concluded it would be a big saving to drop the Prudential policy and take a policy in the stockholders' company. She made application for two policies in the sum of \$1,500 each, which were issued August 2, 1932. James was the beneficiary in said policies. There was no evidence of any attempt at secrecy in discussing any of the insurance policies or that any coercion or persuasion was used by James. In fact the evidence is without contradiction that in both cases the respective wives talked with the agents freely and separately and apart from the defendant.

The prosecution has given over-emphasis to a letter written by Winona's sister upon request of James and at the joint dictation of James and Pries, agent for the Prudential Company, signed by James and addressed to Dr. Hanford, who was the chief attending physician during the time Mrs. James was confined at the Colorado Springs hospital. The letter was written wholly at the suggestion of the insurance company's agent who wrote the policy and it had to do with the death certificate signed by the coroner, Dr. Gilmore. The agent was of the view that the report was incomplete in that it did not report the holding of an inquest. Further, inasmuch as accidental drowning was not of itself a compensable accident, that there should be shown, to entitle the claimant to double indemnity, in addition to death by drowning, merely an antecedent accident as the proxi-

mate cause of death. The understanding of the parties seem to have been that if an independent accident directly caused the drowning double indemnity was recoverable and this accepted view was termed by all as a "contributing cause" of death. The agent suggested to James that if the injuries to the head were the proximate cause of the drowning, such as causing a cerebral hemorrhage, or causing other symptoms, no doubt such as dizziness caused from sudden or unusual movements of the body following long confinement in bed by reason of head injuries, the coroner's report should show it, as the company would require a report showing an accident as a "contributing cause" of death. Dr. Hanford, the physician who attended Mrs. James for several weeks in a Colorado hospital, upon the receipt of the letter took the matter up with Dr. Gilmore with the result that the completed report showed the "contributing cause". The amended report, after consultation with Dr. Hanford and others, satisfied both the coroner and the insurance company and double indemnity was paid to James at Birmingham, where he had gone to visit with his people. There was nothing in the letter or in the trans-[fol. 2677] action itself that savors in the slightest degree of a criminal purpose. Further, it has no evidentiary relation to the main and important issue of the case. As a matter of fact no inquest was held. When the possibility of an inquest was mentioned James said he could not permit or bear to have an inquest held and requested the coroner, if possible, to forego an inquest. The coroner, after investigating and finding no suspicious facts or circumstances implicating James in the commission of a crime, dispensed with holding an inquest. This is taken by the prosecution as an attempt on the part of James to suppress evidence. None of the several employees of the Pike's Peak Auto Company who were at the scene of the wreck in 1932 and who were brought to this state and testified at the trial to physical conditions and in contradiction to alleged statements made four years prior thereto as to what was done and said by James in explanation of the wreck, made known by complaint or accusation any suspicious circumstances or any incriminating fact of which they had knowledge either in September, 1932, at the time the wreck occurred, or in October after Mrs. James' death at a time when the matter was in the coroner's hand for investigation. No action was ever taken by the Colorado authorities.

James became a witness in his own behalf and much of his testimony on material matters is uncontradicted. He and his wife left Los Angeles the latter part of September, 1932, shortly after their marriage, for a visit to his old home in Alabama. Before leaving they secured a loan of \$150 on the Kansas City policy. They anticipated an extended visit and he leased his shop during his absence on a commission basis. As before stated, his wife's mother had authorized James to attend to the leasing of property owned by her in Colorado for a term of one year to a prospective tenant. His wife also had relatives in or about Colorado Springs whom they had planned to and did visit. In keeping with their planned itinerary, they left Colorado Springs about noon on September 21, 1932, to make the trip to the summit of Pike's Peak. They spent some time at the summit and started down the mountain at about 5 o'clock, as the sun was dropping behind the peaks. James said his wife expressed a desire to drive down and he yielded to her request. After they had gone a few miles he was viewing the scenery and the setting sun through a pair of binoculars or field glasses. The road was narrow, steep and winding. Many sign posts warned sightseers to "drive in the second gear". While thus engaged in sightseeing, he felt the car make a lunge as though moving through the air. We will not attempt to describe the movements of a car or to lay down a rule of action which should be observed by the occupants of a car in moments of sudden, impending peril. It cannot be done. James said he was thrown from the car with great force as it plunged down the mountain side and lodged against a granite boulder. The car landed upright but the wheels were crushed and the body was resting on or near the ground. It was otherwise badly damaged. James said he was rendered unconscious for the time being by being whirled over the rough ground for a considerable distance. As soon as he was able he went to his wife's assistance. He found her bleeding very freely from the forehead and side of the head. She was partly in and partly out of the car. He was in a state of great mental perturbation, suffering from shock and injury to the back and his right leg was rendered almost useless. It was then rapidly getting dark and he searched for his pistol to fire an alarm but it was gone. His purse was also missing and [fol. 2678] he was left penniless. He never recovered

either. All that his wife could say was "get a doctor". He attempted to lift her out of the car but found he could not handle her. In attempting to extricate herself from the car she had projected her head without the car and it had come in contact with granite boulders in the descent. After orienting himself as best he could he placed a blanket under and over her body and started to go back to the summit, which was the nearest station, to summon help but found the grade was steep and, as his injured leg impeded his progress, he changed his course and went down grade to Glen Cove, which, though somewhat further in distance was, because of his crippled condition, shorter in time. He reported the matter to the superintendent of the road and a crew of men in wrecking cars and with the necessary appliances went to the place where Mrs. James was left and in due time she was taken to the Beth-El Hospital, at Colorado Springs, where she was placed in the hands of two or three specialists in cranial surgery and two trained nurses. Telegrams were sent by James to Mrs. James' mother in Los Angeles, her father in Idaho, and to her sister. James found himself without money in the midst of mounting hospital, medical and nurse-hire charges. His father-in-law loaned him \$100, one nurse was finally dispensed with, James and the father taking her place. The man in charge of his business at Los Angeles wired him \$100. Mrs. James made good progress and after seventeen days, October 8th, her condition then permitting, and on her request, she was taken to El Cajon cottage on Capitol Hill at Manitou, a resort some six miles from Colorado Springs, to bring the costs within their means.

Mrs. James' wounds had bled profusely and her hair was described as a compact mass. James testified, and no attending or other physician was called to contradict the fact or the practice in such cases, that the attending physician had repeatedly given strict orders not to wet the hair or attempt to remove the dried and matted blood for fear of an infection. An operation had been performed. Mrs. James had become highly nervous and wrought up because of the refusal of her husband to wash the dried blood, which was crumbling in particles upon the bed clothing, from her hair.

On October 14th, James, after changing the bed linen, preparing breakfast for Mrs. James and putting the cot-

tage in order, left at one or one thirty o'clock in the afternoon to go to Colorado Springs to inquire as to the arrival of mail. He had been negotiating for several days with an insurance company for a loan of \$250 on a policy of insurance and he expected a check from the company on that day. He also went to Colorado Springs to assure the hospital manager that his bill would be paid. It may be observed at this point that the check did come by mail a few days thereafter and was used to pay hospital and doctor bills and expenses of transporting his wife's body to Forrest Lawn, Los Angeles county, for burial. He had made a number of visits in anticipation of mail and on business matters in connection with his indebtedness as his creditors were pressing him hard for payment. He first went to the general store, which was a mile from his cottage, and there took a stage for Colorado Springs.

Alva E. Custer, the proprietor of the hotel at Colorado Springs where James had stopped during a part of the time his wife was at the hospital, was brought by the prosecution from Colorado and testified on behalf of the people. He had talked with James more or less about the accident and about his financial affairs during his stay at the hotel. [fol. 2079] Just before moving out of the hotel, James told him he was going to move his wife from the hospital to reduce expenses as he was then able to take care of her and did not have the money to keep her at the hospital and there was no use going deeper into debt. He said he had nothing to do but take care of her. He said the doctor had cautioned both him and Mrs. James against stooping over because it might cause dizziness and also against washing her head as it might cause infection. The conversation occurred more than a week before the witness heard of Mrs. James' death. The admonition of the doctor was elicited by the prosecution and no witness was called to refute it. It was repeatedly asserted by James. Custer saw James as he came to the hotel on the afternoon of the day Mrs. James died. He talked with him and inquired as to Mrs. James' condition. James said he regretted leaving her at the cottage but he had come to the Springs in anticipation of hearing from his insurance business and to see if the Company had left any word at the hotel.

Custer testified that James left the hotel on the day of his wife's death "mid-afternoon". "Q. Three or four

o'clock? A. Yes, that would be what I would think, around 4:00 o'clock. Q. About four o'clock? A. Yes." The distance from Colorado Springs to Manitou was six miles up hill. The time element is important in fixing the time when the defendant arrived at El Cajon cottage with Gerald Rogers, the deliveryman for Leonard's grocery store, who was with the defendant when the body of Mrs. James was first seen after death. Gerald Rogers fixed the time as "around 5 o'clock" in the afternoon. James, according to Custer, left his hotel about 4 o'clock. Custer did not know where he went immediately from the hotel. If he went to Manitou by foot he could not have made the distance in less than one hour and thirty minutes, according to Custer's estimate. If he went by stage, the way being evidently through a mountainous area and up hill, it would have taken him, at the rate of forty miles an hour, approximately twenty minutes to arrive at Leonard's grocery store where he made a purchase of provisions. James' cottage was another mile from the store. It is so improbable as to create a reasonable doubt that James could, within the time limits fixed by the witnesses, have gone from Colorado Springs by coach to Manitou, then walked to his cottage, drowned his wife, and walked back to the grocery store, purchased his provisions and returned in the grocery truck with the deliveryman, even though he had acted with unusual expedition. Such a theory has been advanced. If he drowned her it must have been before he went to Colorado Springs. The time element, it seems, would preclude any other theory so far as the evidence produced by the prosecution bears on the question. Gerald Rogers, who was with James when the body was discovered in the tub and assisted James in its removal, testified that the water half filled the tub, which was about four feet in length, and was lukewarm and the nude body was face upward and was quite warm. The water and the body were quite "soapy". The body lay with the head directly under the two water faucets, hot and cold, at the foot of the tub and her feet were extended over the rounded edge or side of the tub near the foot. The body was carried by James and Rogers to the bed and the coroner was immediately summoned. Gerald Rogers said that on several occasions James had ridden with him in his delivery truck making deliveries to his cottage. On the day in question, after

making purchases of provisions, James remarked that he wanted to ride with him. This was around five o'clock. [fol. 2680] Shortly thereafter they arrived at the cottage. Both got out of the delivery truck, Rogers carrying the groceries, and entered the front door, James in advance. James looked into the bedroom but his wife was not in her bed. Rogers continued into the kitchen with the groceries. He next saw James coming out of the dining room into the kitchen. James then opened the bathroom door and called to Rogers, who looked into the bathroom and saw Mrs. James in the bathtub as above described. Her eyes were open but she was dead. Her mouth and nose were slightly below the surface of the water. A package of Pearl Soap flakes which was kept in the kitchen had been removed and the bath water was heavily impregnated with soap and her body made slippery by it. Her nightgown was in a corner of the bathroom. The cottage was situated at the top of Capitol Hill and there were a number of cottages, both occupied and unoccupied, within half a block of the James cottage. There is nothing in the testimony as to the bathtub occurrence, save its tragic cast, which has any incriminating significance. It cannot be otherwise construed except by the indulgence of suspicion and surmise, or by reversing the rule of law as to the indulgence of presumptions and inferences by casting the burden on the defendant and resolving all inferences against him.

James said his wife suggested going to Manitou and renting a cottage. He wanted to take her to her cousin's home, the Yarnells', but she objected to going there. The defendant acted as her night nurse at the hospital. Mrs. James' father also helped to nurse her. At the cottage James personally prepared her meals, bathed her and attended to her needs. The defendant went to the store and postoffice every day to buy provisions and mail letters written by Mrs. James. On the day in question he prepared her lunch and performed the household duties and, about one o'clock, started for Colorado Springs. He called at the hospital and, having finished his business, he went to the hotel, where he had formerly stopped, to inquire for his mail. It was not earlier than 4:30 when he got back to Manitou. He went to the grocery store and made his purchase of groceries, riding home with the deliveryman as heretofore told. On entering the cottage he found she

as not in her bed. It is not necessary to repeat the story substantially told by Gerald Rogers as it adds nothing to what has been told. James testified that Winona, whom the Superintendent of the Pike's Peak Automobile Highway Company said had a strongly liquor laden breath, was a consistent abstainer from the use of liquor in any form and no evidence of any effects of liquor was reported by any of the physicians or nurses who attended her.

Another collateral issue brought into the case upon which prejudicial error is also earnestly urged by the defense is the testimony of Miss Yarnell, a cousin of Mrs. James, with respect to certain "advances" made to her by James. Miss Yarnell was a resident of Colorado Springs and she visited Mrs. James every evening when she was in the hospital and all but one or two when she was at the cottage. She drove James every day from the hospital to his hotel and frequently took him on drives about the city. She went to his room at the hotel and wrote all of his letters. She testified she had seen Mrs. James get out of bed and walk—the distance was not stated. She did not see her out of bed on any occasion at the cottage, but saw her sitting up in bed. She never heard her complain of dizziness. Her hair was matted with blood. The "advances" spoken of consisted of offers to kiss her a couple of times while driving. He attempted [fol. 2681] to kiss her in his room at the hotel but she told him to "cut it out". She continued to write his letters and to extend many favors to him. When he left with his wife's body for California she kissed him good-bye and he gave her some money for her many kindnesses, especially in driving him about the city. She visited Los Angeles some time afterward and she met and talked with him. The people rely on the Gosden case, *supra*, as an authority for the admission of the kissing episode above related. The Gosden case adopted a quotation from *People v. Smith*, 55 Cal. App. 324, 335, holding, to quote the exact words, that "evidence tending to show illicit relations of the accused with another is admissible to show lack of love and affection for the defendant's lawful spouse". *Pierson v. People*, 79 N. Y. 424, 435, is also cited in the Gosden case as authority showing motive where the defendant married the wife of the deceased within one week after the husband's death. Under the facts of that case it was held that it might be inferred that Gosden's interest in the woman with whom

he had illicit relations, antedated the death of his wife. It is a far cry from the cited case to the instant case, in which it was contended all along that the insurance money was the motive for the alleged murder, until, for the moment, the prosecution changed the motive to lustful or matrimonial reasons when, as a matter of fact, there is no evidence to sustain the contention that before, at the time of or since the death of defendant's wife there were either illicit relations or desire or design on defendant's part to make Miss Yarnell his wife. Her testimony and conduct exculpate both herself and the defendant. Other instances in which collateral matters, which had no more than a colorable claim to admissibility but which decidedly tended to degrade the defendant on trial, include the sordid story of Madge Reed. No one can conclude from her testimony that James was moved to kill Mrs. James because of any desire to make Madge Reed his wife. The fact stands out that he did not marry her or make any effort to marry her. These collateral matters, valuable only for prejudicial effect, should have been excluded.

There are two uncontrovertible obstacles which stand in the way of the prosecution's theory that James planned to kill his wife with the hammer which was left on the blood bespattered floor of the automobile, covered with blood. The hammer, James explained, was taken from the rear of the car the day before and used to change a tire. He had not yet returned it to its proper place. The question which presses for answer is why, if he took his wife up the mountain to kill her and planned to give the cause of death the appearance of an accident, did he not make certain that he had executed his murderous design? He was not pressed for time. In fact, he was at the scene of the accident for some considerable time. Again, how can the fact be accounted for on any reasonable theory that the deceased, who was attended by two or three physicians and two nurses, in the care of her father for a week or more, and daily visited by Miss Yarnell during her three weeks of illness and convalescence period, made no complaint and gave no hint that her husband had attempted her life? The prosecution suggest possible retrograde amnesia, loss of memory for a period just preceding a blow administered to the head, or, that Mrs. James, the former automobile company bookkeeper and school teacher, whom James testi-

fied never drank any kind of intoxicating liquor (and no one testified that she ever did), placed on a dangerous road, rendered herself unconscious by voluntary intoxication as [fol. 2682] to everything that happened just prior to receiving the injury. Another question that cannot be satisfactorily answered is, why did not James, having planned to kill his wife with a hammer, after using it, throw the bloody instrument into the depths of the canyon or cavern for concealment, which the ruggedness of the country so abundantly invited? The inferences are that James was not drunk. The witness who detected a strong odor of liquor on Mrs. James' breath did not detect any on James'. The fact that the attending physician removed particles of granite rock, which were imbedded in the wound in the side of Mrs. James' head, is additional refutation of the theory that she was struck on the head with a hammer or blunt instrument in the hands of James. That her body was thrown against granite rock, both in the descent of the car and by its impact with the boulder which stopped its course, does not admit of doubt. The windshield was broken. The wound on the forehead contained no granite particles.

J. D. Rogers, and several other employees of the Pike's Peak Auto Highway Company, were witnesses for the prosecution. Rogers testified as to the safety of the highway and the infrequency of accidents occurring on it. The testimony of these witnesses as to alleged contradictory statements made by James four years in the past with respect to the proprieties with which he conducted himself in the circumstances of the situation, (largely mere matters of detail and order of events) bear the infirmities of uncertain memory which might be expected. It is claimed that they were inconsistent with and contradictory of other statements as to the manner of and the cause of the car going off the road and as to James' acts immediately thereafter. Rogers testified that he found in the rear of James' car a pint or quart bottle of liquor about two-thirds full. He thought it bore a Mexican or foreign label. James testified that he purchased three pint bottles of liquor on a physician's prescription which he was taking to his aged mother, residing in Alabama, who needed stimulants. Alabama was strictly closed to the sale of liquor. We will not undertake to discuss the probative value of such testimony. The uncertainty and weakness of testimony given in an attempt

to recall statements and conduct, estimates as to distance and the situation of objects which are not sufficiently important or exceptional as to make a lasting impression on the mind at the time they occurred, is to be expected. The important question in the case is—was it shown by material, substantial evidence that James attempted to kill his wife on the automobile trip to the summit, and that he failed to execute his premeditated purpose? He set out soon after the accident to bring assistance and witnesses to the scene. Rogers testified that he saw footprints along the side of the track of an automobile for some distance before it appeared to leave the grade. The footprints were not examined until a crew of seven or eight men had been at the scene of the accident for three hours. He said there was some dust in the roadbed which was graveled. Rogers could not say the footprints he saw fitted James' shoes. He thought they were made by a man. A number of people and automobiles had been on the road on that day, James being the last to check out. Rogers' testimony on many subjects of inquiry shows much uncertainty as to the exact fact. James claimed that he put one of the robes under Mrs. James and about her body, but Rogers said he found none and took one or two from the back of the car and himself placed it under her body. He did find one in the fore part of the car. He did not observe James showing signs of injuries but he said he did hear him moaning once or twice. He mentioned what he felt were failures to properly provide for Mrs. James' comfort before he left for assistance in the stress of the situation. James' testimony is that Mrs. James was bleeding very profusely and he was fearful she would die before he could summon medical aid. It was asserted in argument to the jury that the defendant was a "cunning and artful plotter". If he had deliberately planned the murder of his wife with a hammer on Pike's Peak it would seem to have been more in keeping with the prosecution's characterization of him if he had done the things the prosecution denounced him for failing to do and arranged things in orderly fashion in order to deceive the officers he went to summon and, in so doing, taken pains that no tell-tale evidence such as the instrument of death should be a witness against him.

We are of the view that if the proof as to the Colorado murder had been placed before a court exercising civil juris-

diction upon the same evidence adduced upon the trial, the court would clearly be compelled to grant a motion, if made, to direct the jury to return a verdict for the defendant.

There was admitted into evidence, against the objection of the attorneys for the defendant, a purported confession made by James. The objection was based on the ground that the confession was not shown to have been made voluntarily and free from duress, menace, fraud and without hope of favor or reward, as provided by law, but was exacted by a course of cruel and insufferable treatment, participated in by a dozen or more investigators connected with the office of the district attorney, police and deputy sheriffs of the city and county of Los Angeles and persisted in to the point that the defendant was rendered too weak to withstand further physical beatings and mental torture with which he was threatened. The defendant was taken into custody on Sunday morning, April 19, 1936, about nine o'clock, some days after a dictaphone connection had been installed in his residence. The investigation squad actively engaged on the case consisted of J. C. Southard, in command, Charles Griffen, chief assistant of the bureau of investigation, Deputy Sheriff Williard Killion, and Investigators Everett Davis, Gray, Scott Littleton, Harry Dean, John L. Martin and Earl E. Kynette. All of said officers were unquestionably working together actively day and night with the definite purpose of forcing the defendant into a confession.

On Sunday morning, April 19, James was taken from his home at 3886 La Salle avenue by Southard, Griffen and Dean, investigators, to a private house next door, 3882 La Salle avenue, occupied by the officers for spying and dictaphone purposes, where the dictaphone's part in the case was explained to him. This was done for its psychological effect. Southard said he took "quite a crowd" with him at the time he and the officers took James to the house and exhibited to him the dictaphone apparatus. A number of newspaper men, District Attorney Fitts, Deputy District Attorney Williams, Officers Scott Littleton, Davis and Dean were among the crowd present. He was then taken to the office of Lieutenant Morgan, where he was questioned for more than an hour. He was next taken to the district attorney's office (Sunday forenoon) where he was examined at great length and was called upon to defend himself against grave charges made by the officers. Asked if James was

informed that a charge of murdering his wife was under investigation, Southard answered: "I believe not." Attorney S. J. Silverman, who had been James' attorney in civil matters for some time and had heard that an attempt was being made to have James indicted for the murder of his wife, and James himself, testified that Silverman had instructed James to decline to answer any questions bearing on the alleged homicide except when Silverman was present. At any rate, James refused to talk after he was asked the first few questions and, according to Southard, he told Fitts "to go to hell". They kept right on questioning him. Mr. Williams, a deputy district attorney, Griffen and several other investigators were present. Southard said it could have been possible that they told him they had the goods on him. The arrangement under which James was "worked on" was that he was placed in a large chair, where he was compelled to sit for forty-eight hours, according to the admissions of Southard and other investigators, but, on the showing in the record, the questioning must have continued for sixty hours. The investigators worked in pairs on four-hour shifts. From sheer exhaustion the defendant several times fell asleep. Never less than two and as many as eight or ten officers were plying the defendant with questions at all hours of the night. The alleged confession began to break, after days of unremitting effort, at 1:45 o'clock in the morning. No one, not even Mr. Silverman, the defendant's attorney, or Mr. Parsons, had knowledge of the place in which the defendant was held in private custody by the investigators. Neither his friends, relatives nor the public knew the place of detention. No warrant of arrest had issued and there was no public record, or any record, which would enable anyone not a member of the staff of investigators to know of or discover the presence of defendant.

The law prescribes the places in which persons charged with crime may be detained. A private house located in a residential part of a city and not complying with the provisions of law prescribing the purpose and use of county jails and their management, is not a place where persons charged or suspected of crime may be lawfully detained. Grave abuses may be practiced against persons thus illegally held in secret confinement. (Pen. Code, see 1597, et seq.) Every police officer who, having arrested any person

upon a criminal charge, wilfully delays taking such person before a magistrate for examination is guilty of a misdemeanor. (Sec. 145, Pen. Code.) In the instant case the defendant was held in custody seventeen days without the issuance of a warrant and without being taken before a body which had power to examine the offense with which he was finally charged. He requested that his attorneys, first Mr. S. J. Silverman, whom the district attorney had reported out of the city for the week-end, and then Mr. R. E. Parsons, be contacted. Neither appearing to be immediately available, the inquisition, in which a number of the investigators took part, was vigorously and unremittingly pressed, without delay, through many hours. It was not a proceeding authorized by statute and no sufficient reason was or could be shown why the request of defendant for advice of counsel, a right guaranteed by the Constitution and by statute to every person charged with crime, was not complied with. Section 849 of the Penal Code provides: "When an arrest is made without a warrant by a peace officer * * * the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint, stating the charge against the person, must be laid before the magistrate." [fol. 2685] Section 859, following the procedure above cited, provides that the magistrate must allow the defendant a reasonable time to send for counsel and may postpone the examination for that purpose. Upon request of the defendant, the magistrate must require a peace officer to take a message to any counsel in the township without delay and without fee. These and other provisions of the statute cannot be circumvented by resorting to any methods which tend to deny the rights and protection which the law guarantees to every person charged with a crime. The statutes impose quite substantial fines and terms of imprisonment upon peace officers for the wilful disregard of their duties. (Pen. Code, secs. 145, 147 and 149.)

Early in the confinement of the defendant, Officer Southard committed an admitted battery upon him. He and Officer Griffen were "working" on the defendant when Southard struck him, according to his admission, in the face or on the side of the head. We quote the incident as related by the assistant chief of the bureau of investigation of the district attorney's office, Charles Griffen. Officer Griffen

and Officer Southard were the principals in directing the investigation. He and Southard began their four-hour assignment of questioning at four o'clock Monday morning. Everett Davis was present. They had not met with anticipated success. Griffen introduced the subject by saying that the defendant had been giving answers (no doubt unsatisfactory to them) all morning and Jack (Southard) said: "Your wife Mary was a very sweet girl, very nice woman; she was well thought of by her friends; seems to have come from a good family and it is a shame she had to die the way she did in this pool out there." James replied: "She was not very much. She was a whore when I married her." Griffen said that Southard was sitting in a chair opposite to James and he reached over and slapped him. Griffen then said to Southard: "Take it easy, Jack." The remark reputed to James was a strange statement for a man under investigation for the murder of his wife, before hostile inquisitors, to make to his accusers. James testified that he had told Southard and Griffen "a hundred times", as they repeated Hope's rattlesnake story and the murder of his wife to him and used violent means to compel him to adopt it, that he didn't know what they were talking about and that it was because of his refusal to affirm Hope's story that he was struck. Griffen said that after James was "slapped" they continued to question him but he saw no other violence inflicted upon him. Griffen questioned him the next night until one o'clock a. m. During all the time he was being held incommunicado he did not see James sleep. Griffen volunteered the statement that during all the time he was in custody he was in "much better shape physically and mentally" than any man who worked on the case! This evidence was stricken out but other officers testified substantially to the same thing. James had then been questioned, admittedly for forty-eight hours. There is evidence that it was longer. Several of the officers testified that he was cool and collected at all times and he answered all questions at great length and gave them information they did not formerly have. Griffen said James did complain about his ear, but he examined it and couldn't find anything wrong with it. When Griffen returned to the place of examination at nine o'clock, five other officers were with James. At 8:30 he was taken by Officers Kynette and Davis to Ninth and Alvarado streets. Griffen and Southard followed. At noon he was taken to the district attorney's office. Griffen did

not recall whether James, when at the district attorney's [fol. 2686] office on the day he was taken into custody, had requested that word be sent to Mr. Silverman, his attorney, requesting his presence. On Tuesday he saw the defendant from seven o'clock to one p. m. At eleven o'clock he gave instructions to "book him" at the county jail, where he was committed to the "High Power Tank".

Southard admitted that the investigators operated in relays of pairs for a period of forty-eight hours. The defendant sat in a chair and was not allowed to remove his clothing. Several times he fell asleep from fatigue and exhaustion. Southard's statement as to what he said to James about his wife being such a beautiful little girl, etc., was given in the same words as Griffen's story. James' reply, being somewhat different in substance, we repeat it: "'Aw, leave me alone and quit questioning me about her. She wasn't so much before I married her. She was only a little whore before I married her,' and I lost my temper and slapped him." The defense contended that no such words were ever uttered by James at any time with respect to his wife and it was solely Southard's disappointment in failing to have broken James down by harassment, coercion and physical violence, to the state of accepting Hope's sensational story (which was a composite product of the detectives and investigators in collaboration with Hope) which ired Southard to the point of physical violence. Southard had been an investigator for eight years and was seasoned to his task. His act was inexcusable and was in violation of section 149 of the Penal code, which provides that: "Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years." The defendant was under no compulsion of law or duty to answer the officers in any particular manner or at all. Several apparently disinterested witnesses and one or two officers testified absolutely that James' face showed black and blue and swollen spots which were plainly visible for several days after his arrest. He testified to terrible beatings he received in the private house in which he was detained and that his body was made black and blue from the waist up and that he had suffered a hernia or rupture from the roughing which he passed through. A physician who had examined his abdomen five months prior testified that he had observed no evidence

of hernia at that time but an examination since his arrest clearly disclosed the existence of a hernia. The prosecution called a few witnesses connected with the official staff who testified they did not observe any bruises on the defendant's face but, in the main, their testimony was more in avoidance of direct and positive answers which should have been given by officers of the law. There can be no possible doubt, as testified to by one or two of the officers themselves, and by independent parties, that the defendant's ears bore marks and bruises which anyone at all observant should have seen. James said he was practically made hard of hearing by the head beating he had received from Southard and Griffen, and that his body was black and blue from the waistline upwards. Despite the admissions of the several officers who were most active in conducting the plan of continuous questioning, that James fell asleep several times while being quizzed, from sheer fatigue and exhaustion, nevertheless several of said officers testified, as astounding as it seems, that James was at all times exceptionally cool and calm and showed no signs of mental distress or fatigue, and was [fol. 2687] actually in better physical condition than any one of his inquisitors. And this, too, in spite of the fact that the questioners worked in pairs of four-hour shifts while James admittedly was carried through a sleepless ordeal of not less than forty-eight hours, but more probably sixty hours, with as many as eight or ten investigators plying him with questions. As an example of the evasiveness which characterized the testimony of the investigators generally, we quote from Jack Southard, acting chief of inspectors, as to James' physical appearance at the time he delivered him, after several days of private custody by said officers, to the proper place of detention, the county jail.

“Q. Did you notice any marks or bruises upon his face or head when he was taken into custody? [delivered into legal custody at the county jail.]

A. Not that I recall.

Q. Well, you did notice marks and bruises upon his head when you took him to the county jail, didn't you?

A. No, I don't believe so.

Q. Weren't both of his ears bruised and swollen at that time?

A. They were not.

Q. Neither one of them?

A. That I wouldn't say; one may have been; I wouldn't be positive. I know that both were not.

Q. As a matter of fact you know that one was, don't you?

A. I do not. I saw that one in court.

Q. You saw the bruises here when he was in court?

A. The left ear was a little bit swollen at the top. * * *

Q. He was pretty well worn out when he got to jail, wasn't he?

A. I couldn't tell you." (Emphasis supplied.) He fixed the time he observed the bruises he was then testifying to as of the day he was before the grand jury on the incest charge. The foregoing equivocal testimony as to bruises that were visible on the defendant's body is characteristic of the testimony of the officers in whose personal custody the defendant was held for approximately two weeks. Why he was thus held incommunicado has not been and cannot be accounted for by any theory, except the practically admitted one of forcing the defendant, by the use of physical and intense mental punishment, into making a confession corroborating the unnatural, weird and astounding statement which was in the hands of the investigators and commonly referred to as Hope's story or confession. On cross-examination Southard was asked these pertinent questions to which objections were sustained on the ground that they were immaterial:

"Q. Now, Mr. Southard, when you arrested the defendant why didn't you take him before a magistrate? [Objection sustained.]

Q. The reason you didn't take him before a magistrate at once was because you wanted to get a confession from him, wasn't it? [Objection sustained.]" Southard said he gave instructions that James was not to be left alone at any time; one or more investigators was questioning him at all times; some questions he answered and some he refused to answer; he would just sit and look blankly. Southard testified that he had three meals a day but James testified that he was practically starved into a state in which he told the investigators that he would answer any question in any way that the investigators wanted him to answer it. It is the admitted fact that he was interrogated by the district attorney and his assistant, Mr. Williams, at all hours of the night, for as many as two and a half to three hours. One period continued from one o'clock to six o'clock. The officers also took part in interrogating the defendant. The plan

adopted was that the investigators worked on the defendant to a point where it was deemed expedient or advisable to take him before the district attorney and if satisfactory progress had not been made he would be returned to the private custody of the investigators for the employment of [fol. 2688] such methods as would work a change of mental attitude on the part of the defendant. No other possible answer could be made to their unauthorized action which only ended with the procurement of the alleged confession. At times numerous officers would be present and sometimes, James testified, he was left with but one officer. The evidence adduced by the prosecution affirmatively shows that the defendant was shifted back and forwards in the manner herein described many times at all hours of the day and night, continuing over a long inquisitorial period. At times Hope was brought into the room, and engaged James in controversial disputes.

Officers Killion, Gray, Griffen, Littleton, Davis and Southard were most active in procuring the alleged confession of James. The first signs of a confessional collapse, as told by Killion, occurred at midnight, May 2, thirteen days after James was taken into custody. At the above hour, in the room adjoining the district attorney's office, James said to Killion, "Why don't we go out and get something to eat, and I will tell you *the story*." The conference began at about one in the afternoon and ended at about 2:30 or three o'clock the following morning—a short intermission having been taken for coffee and sandwiches. The reference to "the story" explains the purpose uppermost in the minds of Killion and Gray and accounts for James being in their exclusive custody at the midnight hour instead of being in jail. Killion's reply to James' proposition was, "All right." Killion and Gray then took the defendant to a restaurant at 5th and Figueroa. Killion said he once wrote shorthand. The notes he used to refresh his memory were, to use his words, "some in shorthand, and some in longhand, and some in scribbling". They seemed to have been entered in desultory order in a book and covered thirty-one pages, all of which he said he took during the time he and Gray had James at the restaurant. They had a steak dinner and Killion bought James a cigar and James said, "Now, you want to have this story," and Killion said, "Yes". James said, "All right; there is no hurry, is there?" Killion wanted

him to go back to the office (where the district attorney, his deputies and the investigators were waiting) but James said, "No, this is all right, isn't it?" Killion replied, "Sure, it is all right." James testified at the trial that practically everything he told Killion, Southard and the district attorney concerning the death of his wife was the story which the investigators had drilled into him for hours for several days. He said he was not able to stand further beatings and physical punishment with which he was threatened; that if he gave an answer to a question which did not suit the questioners he was struck on the head. He had also received one or two terrific beatings at the hands of Southard and Griffen; he would have preferred death rather than be returned to the private residence, which the officers threatened to do, where most of the punishment was inflicted. The story he told Killion had been repeated a "thousand" times to him; for days when they repeated to him Hope's story he told the officers that he did not know what they were talking about until he was finally coerced into submission.

The story which Killion reported as James' confession at the midnight dinner contains a great many of the things Hope testified to with added wickedness, equaling, if they do not surpass, the rattlesnake horrors. James is reported as saying that he and Hope were to split the insurance money. Hope asked James to let him "bump Mrs. James [fol. 2689] off". Hope also suggested a fake holdup in which he was to shoot her. Hope told Mrs. James he was a medical student and could produce a miscarriage and Mrs. James wanted him to relieve her pregnancy. Hope had asked James why he didn't kill his wife and get the insurance inasmuch as she was sick and dying. Hope said he would get a rattlesnake "that would kill her quick". He and Hope got drunk frequently. Finally James realized that they were doing wrong and he said to Hope, "We are both nuts". Hope said he had to have some money. Hope proposed getting a spider. He brought some spiders home and James threw them out. Hope then began a quest for snakes. On Saturday night Hope and Mary talked about an operation, but both got drunk and Hope left. Hope came back Saturday morning (two days before her death) half drunk and he and Mary got drunk. Hope said he was going to do the work and at one o'clock James drove away in his car. He knew Hope was going to kill Mary with

the snakes within an hour. He came back in two hours and Mary was pretty sick in bed. She didn't know what had happened. She was very drunk. He spoke to her and she said she was very sick but she would be all right tomorrow and she kept calling for him. James said the letter written by Mary to her sister was at his dictation; that he got her drunk and had her write it. Hope left, and James drank all Sunday. Hope came back at six o'clock Monday morning, and asked if Mary was dead, and James said, "No, she is all right", and Hope inquired if the snake had bitten her and James said he didn't know. He said she was all right. Hope looked at her leg, which was black, and he told James that he had turned the snake out, and he asked "what will we do". James said, "I am going to get drunk". Hope told James to go ahead (and get drunk) and he would finish the job and James asked him how he was going to do it and Hope said, "I will set the house on fire and in that way we can get [rid of] everything". Hope said they could not quit now—"they would know about the snakes".

James said he felt like taking a drive and went out Wilshire Boulevard and then to his shop, and Hope came into the shop, Monday, August 5th, between twelve and one o'clock, and they went to Melody Lane for lunch. It will be recalled that two or three of James' former workmen testified that James was out for lunch not longer than twenty or thirty minutes and appeared perfectly sober and normal. At lunch Hope said, "Well, I got rid of her", and James asked if he had burned the house, and Hope answered no, that he drowned her in the bathtub, and James said, "Well, you are the craziest son-of-a-bitch I ever saw". They had a big argument during which James said, "Don't you know they will throw me in jail tonight? I had a wife drown in Colorado in a bathtub and I know I will be in jail." Hope told him his wife was too sick and drunk to know when he put her in the tub; he said he "put a belt around her arms, and tied her", and James talked about the Colorado wife. James then said, "Well, I went in with you, and I will take the rap. I have no defense". James then gave him \$30. Hope told James he had cleaned up the house, burned the blankets, sweaters, etc., and had thrown the body into the fish pond. Hope said he had taken all the evidence to his home and destroyed it. James said to him, "You damned fool, did you burn up that stuff",

and Hope said, "Yes". James said the woman, Hope's [fol. 2690] girl or wife (he didn't know which), will "spill everything" and Hope said not to worry about her, "he had enough on her to hang her". Hope said she knew everything but she would be afraid to talk. James volunteered that he had a notion to kill Hope but he was afraid if he did the woman would talk and he "didn't want to have to kill them both". Hope assured him that he had enough on that woman to keep her from talking. Hope said while he was in the Verdugo home trying to have the snake bite her, some people came but he had the blinds down and the doors locked. James said that was probably the time Ethel Smith and her party were there. Hope had told James if he could "kill Mary as he had", they could get double indemnity on the insurance and they "would split it 50-50."

James was afraid of what Hope had done and when he went home Monday night he took the Pembertons with him. The various sums of money Hope claims James paid him, \$100, \$30, \$25, and \$100, were restated. James said he made up his mind to kill Hope, but Mrs. Hope knew as much as Hope, so he did not execute his intention. James told Hope he would share \$5,000 with him as soon as the insurance companies paid. Hope came to James one night about two weeks before James was arrested (this would be in April, 1936) and was "beefing" about money and James said to him, "We played and lost" and "I am not going to be chiseled any more for money". Hope said if he didn't give him some money he would "squeal". James replied, "All right, squeal go ahead and squeal." (It appears that Hope became insistent for money about the time the lawsuit involving the payment of the insurance money was filed.) At this point, according to Killion, the restaurant confession was concluded by James in the following language: "Now, that is the story, and I never would have told it, if Hope hadn't squealed. There isn't enough men in the District Attorney's office to make me talk."

The record shows that at least three members of the district attorney's staff and some ten or twelve investigators and officers had to this point been making continuous and vehement efforts to get a confession from James. Immediately James was taken to the district attorney's office by automobile where District Attorney Fitts, Chief Deputy Attorney Stewart, Chief Blummer, Officers Griffen, Jack Southard, Davis, Killion, Gray and Miss Adams, the state-

ment reporter for the district attorney's office, were assembled. Hope was also present. It was then around two o'clock in the morning. James was greeted as follows: Mr. Fitts: "Mr. James, the boys have told me that you told the story." Mr. James: "They have got it". It was suggested by the district attorney that he begin in his own way and relate the story. James answered that it was a very long one and it would take three or four days to tell it. He began by telling of Hope coming to his house under the influence of liquor July 3rd or 4th, saying he was broke, without work, and his "gal" had thrown him out and he didn't have a place to sleep. James said he and his sister, Mrs. Murphy, were doctoring chickens sick with roup. Hope was drunk and James would not let him stay that night, gave him a dollar to get a bed and told him to come back sober, and he could stay until he got on his feet. He came back the next day and stayed two nights, occupying the sleeping porch. The third night he did not appear. Mrs. Murphy, a telephone operator of Morris, Alabama, and sister of James, was visiting him. She met Hope and prepared the meals. Mrs. James was then attending the Long Beach dental conference [vol. 2691] vention. Mrs. Murphy corroborated James as to Hope coming to his home drunk and entering the garage where they were doctoring sick chickens and James giving him a dollar and sending him away for the night. Hope said James first discussed the killing of his wife when she was in Long Beach. Hope knew her life was insured and said: "She is going to die anyway; why don't you kill her?" James said he couldn't do it and Hope said he would "take her up here and shoot her in a holdup". James replied that a lot of people had been hung for that. Hope then said he had been working with "a bunch of racketeers" and he had a white powder in a box that would kill in five minutes by breaking the skin on the hand and rubbing it into the wound. He wanted to try it on one of James' chickens, but James told him it was ridiculous. Hope then said he would do the job himself with a couple of snakes. It was agreed that James would give him half the insurance money. James gave him \$20.

When Mary came back from Long Beach she was pregnant and sick and she finally decided she could not go through with child delivery, and wanted James to take her to a doctor. James said he did not want her to abort. She said, "Hope

tells me he is a doctor. Why don't you let him take care of it?" Hope disappeared and did not return for two weeks. Hope had told her he was a medical student and she asked James if he was and he said yes. Hope talked with her and it was agreed that he would take care of her. The abortion was to be performed Sunday morning, August 4th. James said if Hope put Mary's foot in a box in which there was a snake or snakes he never saw it. They had agreed to let the snake bite her. Hope would never tell where he got the snakes. Some of his snakes wouldn't strike and those that would were not venomous. Hope put rats, chickens and a rabbit in the box and nothing happened. In fact he put a rabbit in the box with one of the snakes and the next morning the rattlesnake was dead and the rabbit was walking around. He laughed at Hope and told him to lay off. Hope took his car one morning from the place where James was having it greased. He was gone three days and came back drunk. He said he had been to Phoenix, Arizona, to get black widow spiders. This was before he brought the third lot of rattlesnakes. He said, "All you have to do is throw them in bed with her and they will bite her". James said he laughed and threw his "damned spiders" out. Hope came over to his shop and James said, "Hope, you are nuts and so am I. Forget about it". He said he would. When James next saw Hope he was drunk. James said Hope was nuts when drunk. He said to James, "Come out here, I have a tip where I can get hot snakes". James told him he didn't want him to get any more snakes as they would get them in trouble. Hope said James was not going to walk out on him. He wanted to make some money. James gave him \$6 on Saturday night and he got two hot snakes. His wife was with him and knew "to a certain extent" what they were to be used for. Hope took James home and they both got drunk. Mrs. James drank with them. "She dearly loved booze. No matter *how sick* she was she loved a drink." It may be parenthetically remarked that much of James' statement made after his midnight dinner as offered by the prosecution, reads as if he was intoxicated when he made it—particularly the last quotation as well as other parts. The snakes were in the box which Hope put in the garage and said he would be back in the morning. Before leaving Hope talked over with [fol. 2692] Mary the performing of the abortion on the next day. She was happy to have it done. James never quit

drinking all night long and was quite tight when Hope arrived next day at eleven o'clock. James gave Hope \$100 and left about one o'clock and returned about four o'clock Sunday afternoon. Hope told him she would die in "an hour, or fifteen minutes". James went in to see her. Hope had her full of liquor. Hope was very drunk himself. Two or three bottles were in the room. Hope took care of taping her eyes and mouth and tying her arms.

At this point Officer Killion interrupted by asking James if Hope told him (James) when he was about to leave, if he was going to do the work, and James answered that he did and he told Hope he couldn't have anything to do with it because she had been too good to him and he just couldn't have "anything to do with *that part* of it." James had previously said that he had opposed Mary going to a doctor for the performance of an abortion as he felt her health would not stand it. From the subject matter both before and following the "work that was to be done," the reference is clearly to the abortion that was to be performed. Continuing, James said he was very drunk and got into his car and just drove around. When he came back about four o'clock he asked Hope how Mary was but Hope was so drunk that he didn't know what he was about. Mary was in bed covered up and made no complaint as to illness. Hope took the car and returned at six o'clock the next morning. He did not take the snake with him. When James came back, Hope told him he had put Mary's foot in the box and the snake had bitten her three times, but it had no effect on her. He further states that he had inoculated her in the leg and had performed the abortion. She complained of her leg hurting her. James said he was all upset and he and she sat and drank all night. He didn't think she felt any snake bite.

Hope came in at six o'clock the following morning and Mary's foot and ankle were swollen. James said she was all right, nothing the matter with her and after talking over her case, James asked "What are you going to do about that? We had better call it off." Hope said we had gone too far, they will know it's a snake bite and she is going to talk. James asked, "What are we going to do with her?" and Hope said, leave it to him, he would take care of her. James again asked, "What are you going to do with her and Hope said, "She smokes a lot of cigarettes and lots

of people die by smoking in bed. I'll burn the house up." James said he kept taking a few drinks and finally got in his car and left about six o'clock. He said he was drunk and was trying to get sober. He ate breakfast and went to work at 8:45. About one o'clock Hope came into his shop and said, "Everything's all right." He and Hope had lunch and on the way back James asked him if he burned the house and Hope said no, he threw her in the bathtub and drowned her. James said, "You damned fool, that's the worst thing you could have done. I had a wife drown in a bathtub in Colorado Springs a little while ago." Hope didn't know that. James said, "Well, you really played hell, but it's too late now." James asked if he left her in the bathtub and Hope said no, he threw her in the fish pond. James said, "That won't stick. They will throw me in the jug when they find her. I'll be a good sport. You made a god-damned fool of yourself and me both, but I'll take the rap. There ain't enough men in the District Attorney's office to make me talk; and there wasn't, if he had not told it. You never would have got me to talk. So of [fol. 2693] course I arranged with this couple to go home with me."

James was asked if he killed his wife in Colorado, and he answered that he did not; or his nephew to whom he had been kind and helpful and who held a policy of insurance in which James was the beneficiary. The nephew was killed in San Francisco in an automobile accident at a time when James was living in Los Angeles and he could not have had any part in it. Hope was asked specific leading questions during the closing period of his alleged voluntary confession and his answers were in accordance with the leading form of the questions asked.

The purported confession which James claims he was forced to tell depicts a carnival of drunken debauchery. James said he was not beaten or struck in the presence of the District Attorney or his deputies, but when he was taken back to the private place of detention, without the hearing of any person save his accusers, he was beaten when he refused to answer, and also for refusals to give answers which were not acceptable to his questioners. Southard admitted that in the early stages of his confinement he refused to answer certain questions. In fact Southard said he told Mr. Fitts on one occasion to "go to hell". It is quite evident that he changed his mind after spending two

days in private detention and the balance of the time in the "High Power Tank".

The foregoing is an epitomization of the incoherent, contradictory, disconnected, incredible and irrational story which the prosecution introduced as the voluntary statement of James. It is fairly comparable to Hope's story.

We now come to the proceeding in which it is claimed that James admitted or affirmed the truth of Hope's story by failure or refusal to deny the same under the well-known rule that where one is directly charged with the commission of a crime, silence on his part or failure to deny the accusation may be received in evidence against him.

On May 2nd, at 11:45 a. m., the defendant was taken into the "Chaplain's" room at the county jail and Hope's confession or statement was read to him. Mr. Lynch, the statement reporter of the sheriff's office, reported the full proceeding. James was brought into the room by Officer Killion. Mr. Williams, Deputy District Attorney, was seated directly opposite James at a table about three and a half feet in width. Officers Southard, Griffen, Killion and Gray were seated across the table from James. Hope was also present. The reporter's notes do not show that the defendant was advised by anyone as to his rights and no showing was made that he was not under duress or as to what was done or said by way of inducement or fear of punishment immediately prior to the statement. Hope was present and the proceedings were begun by Mr. Williams asking the defendant the following question: "Q. James, do you know this man, Chuck Hope? A. Yes, I know him. Q. Now, Chuck Hope told us this morning that on the 4th day of August, the day before your wife was killed, etc. [Here follows two pages of a summarization of Hope's accusatory statement which was read to the defendant.]" At the conclusion of the statement Mr. Williams added: "He makes that statement. Have you got anything to add to it? By Mr. James: A. Nothing. Q. Nothing—that is all."

It certainly would require a reversal of the cardinal rules of criminal law that all inferences and presumptions and intendments of law are to be resolved in favor of innocence, to hold, in the face of James' experiences as shown by the record, that a failure of the accused to add to the accusations [fol. 2694] made by Hope should be taken as an implied admission of guilt. The defendant had been confronted with the accusations of Hope at every hour of the day and night

for several days and he refuted them until he finally yielded at the midnight supper. Would the average person have done otherwise than to have refused to attempt to add to Hope's story of monstrous deeds? In all fairness, should not James have been advised as to the legal effect of his failure to add anything to Hope's story.

It will be noted that the statement to Killion and Gray was not taken in stenographic form. Killion said he took it in shorthand, longhand and by "scribbling". It is in narrative form and bears no semblance to a stenographic report and is in the third person. When immediately taken before the district attorney no effort was made to advise the defendant of his rights. In fact it is admitted that he requested that one or both of his attorneys be communicated with. If either or both were not available at the particular time, it was sufficient notice to the prosecution that the defendant was asserting his statutory rights which could not be nullified by unduly hastening an inquisition not provided by law. It is always the duty of the law's representatives to give all reasonable assistance to the enforcement of an accused's statutory rights.

It may be noted that during the period of intense questioning which continued throughout several days, no statement reporter was present to report the methods by which the confession was attempted to be induced. It is the claim of the defense, and ample evidence supports the contention, that the alleged confession followed a long course of deprivation and physical mistreatment of a prisoner held incommunicado. It was only when the time was deemed ripe for a confession that a reporter was called to report the proceedings and in no instance were the preliminary things done and said, which caused or forced the alleged voluntary confession, made to appear as a part of the report. These important matters, so far as referred to at all, rest in parole. Neither was the defendant properly advised as to his rights or permitted to have independent advice or counsel at the times when the exercise of such rights would have been of benefit to him. The law casts the burden upon the prosecution to show that the confession of guilt was freely and voluntarily made without the exercise of duress, fear, force, or physical or mental cruelty, or hope of reward, or immunity from punishment. Notwithstanding the crime charged may be, as denominated by Lord Hale, the most de-

testable in nature, such as charged in the instant case, and loudly cries for the imposition of the extreme penalty of the law, if legally proved, the integrity of the law, founded on experience and enacted for the safety and protection of society and the individual alike, must, in all cases, be maintained by a compliance with the procedure prescribed by the sovereign will.

Facts and circumstances in an involuntary confession, when found to be true, are admissible. (*People v. Castello*, 194 Cal. 595.) The reason of the rule is that, inasmuch as the theory upon which involuntary confessions are excluded is their possible falsity, if the confession discloses incriminating facts which are shown to be true, the reason of the rule ceases to exist, and so much of the confession as discloses the facts and the facts disclosed are competent. Thus it may be proved that the defendant made an involuntary confession showing where stolen goods were concealed and that the goods were found there, but a further statement "I buried it there" is inadmissible, being part of an involuntary confession. (*People v. Murphy*, 47 Cal. 103; *People v. Hoy Ken*, 34 Cal. 176; *People v. Ah Ki*, 20 Cal. 178.) The foregoing rule has no application to the instant case as every material fact herein is disputed and no physical fact, such as pointed out in *People v. Castello*, *supra*, and the other cited cases, exists in the instant case. Therefore, they are not applicable here.

It is true that several officers testified in terms of conclusions that no violence was inflicted upon the defendant or promises of immunity were made to him in their view or to their knowledge, but this does not meet the situation. Some were not called to testify and others may not have been present at the times physical punishment was used. From the record before us the conclusion is irresistible that unlawful means were employed by concert of action from the first to the time defendant made the alleged Killion statement to force a confession. The burden cast by law upon the People was not met. The case of *People v. Dye*, 119 Cal. App. 262, 269, 273, is directly in point here. Dye was convicted of murder of the second degree. The defendant, being suspected of murder, was taken into custody and confined in the Beverly Hills police station after the same fashion as the defendant here was held in custody by the officers at a private residence. Precisely the same kind of methods—

though by no means as extreme—were adopted there to coerce a confession from the defendant as were adopted in the instant case. Mr. Justice Conrey, then Presiding Justice of the Second Appellate District, Division One, District Court of Appeal, was the author of the opinion which reversed the judgment of conviction and the order denying a new trial.

In discussing the methods by which the confession was procured, the late Justice Conrey said in part: "It shows a persistent questioning of the defendant about various matters, many of which related to the tragedy * * * including a direct charge, which the defendant denied * * *. During the night the defendant became weary and sleepy [in the instant case he became not only sleepy but fainted] but the questioning went right on. Officer Gray admitted that twice he told defendant 'to sit up in his chair'; that the defendant 'may have been nodding; he was not asleep'. In view of the inquisition that was going on, and the condition of the prisoner, these orders were in effect a kind of coercion. The circumstances of the questioning and the method thereof were well calculated to force a confession of guilt, but the process was not at that time successful. It was only after six hours more of questioning * * * followed by three days more of secret imprisonment that the confession was finally obtained. * * *. Considering the wearing-out process of inquisition, the secrecy of the imprisonment, the isolation of the defendant and the unlawful failure to take the defendant before the magistrate (Pen. Code, secs. 821, 824, 849 and 145) the transaction has all the earmarks of a deliberate attempt to force a confession by every means short of promises, direct threats or actual violence. [In the case at bar a direct act of violence in at least one instance is admitted. As to others the evidence is quite convincing.]"

After discussing the fundamental rules governing the voluntary character of confessions, the decision turns to the claim that the confession having been made a few days after the effect of improper methods had ceased to operate on the defendant's mind, the evidence thereby became admissible. The decision continues: "It is also true that if threats and inducements are made to a prisoner, and within a few days thereafter he makes a confession, such acknowledgment of the commission of the crime may not be introduced in evidence unless it clearly appears that the

threats and inducements had ceased to operate upon his mind to bring about his statement of his own guilt." (Citing a number of decisions of our own and appellate court decisions.)

The following pertinent paragraph concludes the discussion: "The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. 'It is an essential [part] of justice that the question of guilt or innocence shall be determined by an orderly [legal] procedure, in which the substantial rights belonging to defendants shall be respected.'" (Opinion written by Mr. Justice Sloss in *People v. O'Bryan*, 165 Cal. 55 [130 Pac. 1042.])' (*People v. Wilson*, 23 Cal. App. 513, 524 [138 Pac. 971, 975].)"

Article VI, section 4½, State Constitution, has no remedial application to the case. Without the alleged confession, Hope being an accomplice, his testimony stands uncorroborated unless there is other evidence which tends to connect James with the commission of the offense. (Sec. 1111, Pen. Code.) This court will not attempt to speculate as to which one, as between James and Hope, a jury would credit or, if it should credit Hope, whether it would find sufficient corroboration in "such other evidence" as would tend to connect James with the commission of an offense carrying with it the death penalty. (Section 1111, Pen. Code.) This would be to speculate solely as to what a jury might do in the consideration of an entirely different state of facts.

The defendant at the outset, and as soon as official pressure was removed, entered his plea of not guilty and protested his innocence as against suspicious circumstances which may have been the fortuitous or unaccountable acts of chance, or may have been the brood of a wicked and designing mind. Indisputably a financial advantage accrued to James by the death of his wife. He was the beneficiary named in the policies of both wives. Both died from drowning. The death of the first was not confused with any considerable number of theories. The death of the second would indicate, if the prosecution's theories are sound, that the perpetrators of the crime became distraught with a strange, fiendish obsession for indulgences in absurd, unusual and unnatural ways, as weird in phantastic conception as the boiling cauldron's "hellish brew" about which

witches danced in frenzied glee as they foretold the unhappy doom of Macbeth, and were not ruled by the normal and natural and less involved ways, in order to profit by the death of another.

It would add nothing to the strength of the prosecution's case to review the great mass of testimony given by the defendant on direct and cross-examination. It will suffice to say that he denied categorically and in detail Hope's rattlesnake stories and every incriminating charge and testified that no rattlesnake was ever on his premises of which he had knowledge. Eliminating the story of Hope, a self-insistent accomplice, and the purported confession of James from the case, there is no person left who claims to have ever seen rattlesnakes in James' garage or on his premises. Hope testified that he had rattlesnakes in his garage in a glass-faced box and another box one foot and a half in length and a foot wide for almost a month. James had occasional visitors and the entrance to his yard was usually through the [fol. 2697] back way into the garage. Mrs. Murphy, James' sister, a mature woman and a telephone operator, who was at his home for two or three weeks and was helping him doctor chickens for the roup when Hope entered James' premises for the first time and addressed James as "Doctor", testified she never saw or heard of a rattlesnake being on the premises. Mike Allman, a reptile showman, is the only other witness who gave any testimony on the subject. His testimony has been set out herein and it is absolutely self-nullifying, contradictory and so uncertain that no court would accept it as sufficient to establish the identity of a man on trial for his life, or even to create a serious suspicion that the identifying witness himself was serious as to his ability to identify the person in question. Three snake men testified they bought from and sold Hope snakes. None knew James in any snake transaction. Hope sold some of the snakes and he said he deliberately threw two of them into the highway. He told the sellers he wanted "fighters"; he wanted to pit them against dogs and game cocks—to win back money he had lost playing poker.

James related his marital relations with his wife and the happy circumstances in which they lived, which was corroborated by the testimony of their close friends, Mr. and Mrs. Pemberton. The testimony of his employees and all persons in a position to know of their relations is that he treated his wife affectionately at all times. Her last letter

to her sister telling her of her sickness assures her sister that she is kindly treated. He testified to his wife's pregnancy and her tendencies to nausea and the many symptoms which attend maternity. He described his leaving home Monday morning at the usual hour. His wife had not had a good night and he advised her to remain in bed all day. He took his breakfast down town to avoid the odor of food in the house. Hope was at the house. Hope later 'phoned to him from down town and told him his wife wanted him to bring home some cottage cheese. James also told how his wife was attired when he left on the morning of August 5th, which corresponded with the attire worn by the blonde woman whom Dr. Alfred Dinsley, a neighbor, saw come out of James' chicken house and stand some twenty-five feet from him, while the dog was barking at him, on the morning of August 5th at 9:25 o'clock.

After unsuccessful negotiations with the insurance company, James told the agent of the company that he was going to sue the company for the insurance money and the agent said the company did not think he would sue because the coroner's jury didn't completely exonerate him of his wife's death, and it felt that a murder charge should be placed against him if he sued. James replied: "I am going to sue them and I will do it if they break my neck." He did file suit.

The inadmissibility of the confession may be placed entirely upon the testimony of the witnesses relied upon by the prosecution.

James testified on the trial as to the ordeal to which he claimed he was subjected before the confession was made to Killion and Gray, and shortly thereafter to the district attorney and the officers in the rooms of the district attorney's office. He said he had been questioned for hours by the district attorney and the officers before he was taken to the restaurant. This is admitted. He said he was made sick and weak. His testimony is that he had told the prosecuting officer time after time that he didn't know anything about Hope's story and about eleven o'clock, after hours of questioning, the district attorney said: "You have heard the story over and over and we are going to clean it up and you had just as well tell me now, because we will be sitting [fol. 2698] here until Monday morning." He said he still persisted that he didn't know anything about the story; that he had never heard of rattlesnakes; that he didn't

understand the story. At twelve o'clock midnight all the officers—some fifteen or twenty of them had been there all evening—cleared the room and sent Jack Southard in to talk to him. Southard told him what he was going to do if he didn't admit the things they wanted him to admit. He said he didn't know the story. He had heard the officers repeat it over many times. When they told him they were going to take him back to the private house and what they were going to do to him—that he had been lying all evening to Fitts—he told them if they wouldn't do it he would try to tell the story as he had heard it. When he tried to tell the story and got "off the story" or omitted to include some portion of it, one of the officers would prompt him by saying, "Didn't this or that happen", and in every instance he accepted their suggestion. The report on the long examination conducted by District Attorney Fitts, from 1:30 in the morning to 2:30 or 3 o'clock, shows that Killion, Gray and Griffen were present and quite often prompted James in relating the restaurant story already referred to. The questioning on this day began at the district attorney's office at two o'clock p. m., May 2nd, and lasted until three o'clock the next morning. On that day he was taken out of his tank and driven to his Verdugo home in company with two or three investigators where he was later met by others. This is admitted. What followed has been told.

District Attorney Fitts did not take the witness chair. It was stipulated that he would testify substantially as Deputy District Attorney Stewart had testified. Mr. Stewart's testimony was brief. He testified that no threats, inducements or promises were made or violence used in his presence or to his knowledge, except the Southard slapping episode. Neither was present at all times during the long hours that the officers were attempting to force a confession. He, as did other officers, testified to the calm, cool and self-possessed demeanor of the defendant at the times he was present. Also that James requested that he be given something to eat just before being taken to the restaurant.

James testified at great length at the trial and we will not attempt to make a complete resume of his testimony. He denied the rattlesnake story and all evidence given by Hope and the officers which tended to connect him with the death of his wife, including the testimony of Madge Reed, which has been sufficiently discussed. His dealings with the

insurance companies, which were openly made with the several agents, have been set forth by the prosecution's witnesses and it is not necessary to again refer to them. Every incriminating fact and circumstance which was brought to his attention was denied. We will briefly refer to his testimony, which is corroborated in several important matters by Mrs. Murphy, who was at his home within a few days of the death of Mrs. James, and by other witnesses. She was in the garage and the back yard much of her time working with the chickens. She saw no snakes.

James testified that Hope came to his shop Saturday, August 3rd, at ten or eleven o'clock. Saturday was a very busy day in the barbershop. He told James he had lost his job and wanted to go to Long Beach to cash his pay-check. Hope borrowed James' car and went away. While he was gone he filled a prescription, written by the attending physician, which James gave him to have filled for his wife. [fol. 2699] At 5:30 he came in the shop and handed James his keys. The next morning, Sunday, at eleven a. m., he came to James' house. He told James he had come to perform an abortion on his wife. James said to him his wife told him about Friday night and he didn't want Hope to tell him anything about it. James said he begged his wife not to submit to an abortion. He wanted her to go to the hospital where he was regularly paying a hospital tuition. She refused to go to the hospital. He told Hope an operation was against his will. James said he had left his earnings in the cash drawer and he drove to Los Angeles to get them. Hope was at the house when he left. He returned at one o'clock and Hope left in James' car. He was to return it that night, but he did not come back until 6:30 Monday morning. James was angered at Hope, and Hope admitted he upbraided him for keeping his car all night. Mrs. James was restless during the night and James left home at the usual hour without breakfast and advised Mrs. James to remain in bed. She said she was as comfortable up as in bed. The Jameses were to dine with the Pembertons that evening, but Mrs. James was not in condition to go and it was arranged that the Pembertons were to dine with the James with the result already told.

Several persons were in the immediate vicinity of the fish pond about nine o'clock on the morning of August 5th, but no one saw her body on the yard walk. Mr. W. D. Me-

Gregor had an appointment with the next door neighbor, Mrs. Pauline Cruickshank, and by mistake entered the James' premises. He rang the James' door bell three or four times, picked up a note and stuck it in the door, and walked about the premises quite a while, but did not see Mrs. James' body. Mrs. Cruickshank was in her yard next door from eight to nine o'clock in the morning but nothing unusual attracted her attention. She said her vision was cut off from the particular locality. The testimony of Dr. Dinsley, who saw the woman described by him on the James premises, did not see Mrs. James' body on the cement walk. The testimony as to the place where Mrs. James' body lay, being more or less hidden from view at certain points, was a disputed matter. Some of the witnesses testified that if Mrs. James' body was at the place described, it would have been visible from almost any point of the yard. Others contended that the shrubbery would have hidden it from view at given points. It is Hope's story that her body lay in the front yard on the sidewalk, from about 6:30 or seven o'clock in the morning until eight o'clock in the evening. If his testimony is true, the weight of probability is that it would have been seen by some one of the several persons who were on and near the premises.

James said he introduced Hope at the breakfast table on Sunday morning, at which Mrs. Murphy, Lois Wright, Hope and himself were present, as Dr. Smith. He said he did so at Hope's request, as Hope said he was keeping his identity concealed inasmuch as he was having trouble with an alimony proceeding. James testified that Hope had told him that he had been, for some time, a medical student and had worked with "dope". On cross-examination James said before he left his home on the morning of August 5th, Mrs. James said she wanted to see Hope and he and Hope went into the house and she told Hope she "had not menstruated yet" and he said "she would and he would stay there with her".

The attorneys for the defendant on motion for new trial, in addition to numerous assignments of error, including erroneous rulings on the admissibility of evidence and the giving or refusing to give requested instructions, filed affidavits setting forth irregularities of the trial which they averred were highly prejudicial and deprived the defendant of a fair trial. While some of the assignments as

to erroneous rulings on matters of evidence are not without merit, we deem it unnecessary to consider each assignment specifically. We are of the view that the rulings against the defendant were in several instances too narrowly restricted. That said investigators, and particularly Officer Southard, were not only adverse witnesses, but were positively hostile to the defendant, incontrovertibly appears from the record. Rulings in such a case as this one should be liberal to the end that the motives, purposes and good faith of the parties may be subjected to a most searching examination.

Counsel for the defense complain as to misconduct on the part of counsel for the People as to their arguments to the jury in assuming facts as actually proved, which were highly controversial matters, and also as to the vehement and scathing manner in which the defendant was arraigned as to matters which were not germane to the main issue. It is not necessary to devote time to other assignments in view of the major errors which in our opinion compel a reversal of the case.

The affidavits of R. E. Parsons and Wm. J. Clark, Esqs., defendant's attorneys, aver various acts of misconduct. They are predicated in the main on the dramatic manner in which two live rattlesnakes were brought into the courtroom in a glass-covered box some five feet in length and placed in front of the jury. The snakes as carried down the aisle shook their rattles furiously. It is not necessary to describe the consternation into which the crowded courtroom was thrown. There are some things of which the court will take judicial notice and this is one. The inside of the box contained smears of venom where the snakes had struck the sides of the box. This was called to the attention of the jury. The averments are that spectators rose to their feet, some gasped from nervous fear and persons nearest the aisles shrank away. Many uttered audible exclamations of fright. Counsel incorporates in his affidavit as descriptive of the scene the following account taken from the Los Angeles Herald-Express, a newspaper of large circulation:

" 'Buzzing their hollow rattles so loudly that women in the crowded courtroom shivered and shuddered at the eerie, frightening sounds, two diamond-back rattlesnakes glittering in their new skins today were placed on the counsel table in Superior Charles W. Fricke's court, where Robert

S. James, Birmingham barber, crouched ghost-faced and jittery at his trial for the murder of his golden-haired bride, Mary.

"Paraded across the courtroom in a velvet covered venom-splashed, 5-foot glass cage, two deadly diamond-back rattlesnakes late today hissed and shook their hollow rattles eerily, and struck out with their evil wedge-shaped heads, as they were exhibited less than 2 feet away, before the fascinated eyes of 10 men and 2 women who make up the jury trying Robert S. James for the murder of his golden-haired wife, Mary'."

The Los Angeles Examiner, another newspaper of wide circulation in Los Angeles, made the following comment:

"Men's enemy from primordial ages, the snake, yesterday was made the living, visible symbol of the Robert James murder case. Two diamond-backed rattlesnakes hissed and struck before the trial jury as a long glass box was borne forward like a hideous offering of a black ritual'."

Affiants have also incorporated in their affidavits various excerpts which purportedly express the prejudice aroused [fol. 2701] in the minds of named jurors against the defendant by the exhibition of the snakes. This, we cannot consider for obvious reasons.

Appellant further complains that the jury was permitted to go at large and mingle freely with the general public, which harbored a strong feeling of prejudice against the defendant before the trial was commenced, and affiant seriously considered making a motion for a change of venue. When the jury was selected affiant suggested to the trial judge that the jury be placed in the hands of the sheriff but the request was not granted. This was a matter within the discretion of the court. The jury was admonished by the learned trial judge on each adjournment not to read any comments made as to the guilt or innocence of the defendant and not to be influenced by anything whatsoever but the evidence and instructions in arriving at their verdict. Be this as it may, it is the contention of appellant that the metropolitan newspapers, before and during the trial, daily printed sensational and prejudicial articles which were circulated in the streets by news-criers and at newsstands which painted the defendant in such hideous colors, to which were added daily adverse comments and overheard street

condemnations, as to make it improbable, if not impossible, for an average person to have calmly and dispassionately withstood withering onslaught and considered the evidence uninfluenced by the hostile opinion of an overwrought and frenzied public, which was unquestionably communicated to the jury in every form of modern news transmission.

It is further averred that an article signed by Scott Littleton, staff investigator for the district attorney's office, was published in a nationally known magazine which was widely circulated in Los Angeles during the trial of the case, purporting to give in detail the methods by which the confession was obtained and matters which did not appear in evidence, all of which were highly prejudicial to defendant. If true, said article is conclusive evidence of the illegal methods employed in obtaining the alleged confession. Said article also contains information which would materially aid the defendant in another trial in breaking down the contention of the prosecution. It is also averred that Madge Reed, whose attempt to extort money from James appears in evidence and who admitted that she gave him the impression that she was ready to commit perjury for money to aid him in his defense if he was prosecuted, has since written letters to the insurance company contesting payment of a policy issued on the life of Mrs. James, and also to the investigators, which have lately come to the knowledge of the defense and which are wholly inconsistent with and at variance with her testimony given at the trial.

By what has been said in considering the case we are not to be understood as vindicating James or in any way absolving him of any criminal connection he may be shown to have had with his wife's death in conformity with the rules of law. Our concern in the matter is that the rights and guarantees which the Constitution and statutes vouchsafe to every person accused of crime shall be fully accorded such person in the form and in the manner provided by the rules which wisdom and long experience have formulated as affording the best and surest protection against criminal acts which the human mind has been able to devise without encroaching on the right to enjoy life and liberty unless, adjudged by the fundamental rules of law under which we have long existed, such citizen or individual has forfeited his rights to the one or the other. The physical consequences that may befall James, or any indi-

vidual, is not more important to the welfare of state than the uniform application of the law to all cases in which human life and liberty are involved.

Some of the major grounds on which I base my dissent are as follows:

1. The inherent improbability of Hope's rattlesnake story.

2. There is no sufficient corroboration of the testimony of Hope that James ever saw any rattlesnakes on his premises or elsewhere.

3. The uncontradicted testimony of the witness, Dinsley, that he saw a woman, who could have been none other than Mrs. James, in her chicken yard, hours after Hope said she was dead. This testimony is corroborated by the fact that several persons were within the James' dooryard at about nine o'clock in the morning and nobody saw her body on the cement walk.

4. The letter found written by Mrs. James to her sister on the morning of August 5th is persuasive evidence that it was written during the daytime of that day and long after the hour that Hope said she had died.

5. There is an abundance of testimony that an abortion was attempted and that Hope permitted himself to be known as "Dr. Hope".

6. The abortion story is further corroborated by the dilemma in which Hope found himself and, according to his own statement, he advised James to take Mrs. James to a hospital. That the person whom they were attempting to kill should be taken by them to a hospital to be restored to health is too absurd to require comment.

7. The testimony of Hope to the effect that Mrs. James was in a sodden state of intoxication at the time of her death is rebutted by the chemical analysis made of her stomach which showed that it contained no alcohol. Serious contradiction and inconsistencies appear in the record which make the testimony of Hope extremely doubtful in many respects.

What has been said by way of disagreement with the main opinion is not to be understood as an imputation that

the officers who participated in the prosecution of James did not believe that he was guilty of the crime charged. The case, as a matter of fact, is so mixed with horrifying incidents as to create a prejudice against the person so charged, which may, unwittingly, influence the judgment of partisans to accept surmises and suspicions and conjectures as proof of substantial facts which they fall short of supporting. The zeal of the officers in an effort to convict has led them far beyond the boundary lines prescribed by the Constitution and the statutes, which cannot be justified on the grounds that the end justified the means. Other grounds compelling a retrial have been heretofore considered.

In my opinion a new trial should be granted.

Seawell, J.

I concur: Curtis, J.

[fol. 2703] IN SUPREME COURT OF CALIFORNIA

OPINION ON REHEARING

By the Court

This cause is before this court on rehearing. In the former opinion (*People v. Lisenba*, 97 Cal. Dec. 378) every point then raised by appellant was discussed. On further consideration of this appeal, we are of the opinion that the proper conclusions were reached in said former opinion on all points then raised. We therefore adopt said opinion as a part of this opinion upon rehearing. Said former opinion follows:

"In an indictment returned by the grand jury of Los Angeles county. Major Raymond Lisenba (also known as Robert S. James and who will be referred to as the defendant), and one Charles H. Hope were jointly charged with the murder of Mary Emma James, defendant's wife. The alleged homicide was perpetrated on or about August 5, 1935, and remained undetected for a period of several months. In fact, the indictment was not returned until May 6, 1936. Thereafter, the accomplice Hope entered a plea of guilty to the charge and at the time of defendant's trial was awaiting sentence. He has been since sentenced to life imprisonment. Hope was the principal witness for the prosecution upon the defendant's trial, at which trial it was the theory of the People that defendant, in league with Hope, had plotted and

consummated the death of defendant's wife for the purpose of collecting and dividing the proceeds of certain insurance policies on her life. It was also the theory of the prosecution that the homicide was perpetrated in such manner as to give the appearance of accidental death not only to allay suspicion but in order to bring into operation the double indemnity provisions of the insurance policies. In this connection, the evidence of the prosecution tends to establish that the conspirators undertook to bring about the deceased's death by means of a deliberately inflicted poisonous rattlesnake bite on the under side of deceased's left foot (the assumption probably being that, if fatal, such bite or laceration would appear to have been incurred in or about the garden of her home) and that this ingenious method of destruction having proved ineffective the conspirators accomplished their objective by deliberately drowning the deceased in the bathtub of her home, whereupon her body was placed in the fish pond on the premises to further the 'accidental' appearance of her demise. The methods assertedly employed to bring about the deceased's untimely death will hereinafter be more fully described upon a detailed recitation of certain of the evidence. Upon the conclusion of defendant's trial, a verdict was returned finding him guilty of murder in the first degree, without recommendation. This appeal is from the judgment imposing the extreme penalty and from the order denying a new trial. We [fol. 2704] turn now to a discussion of pertinent evidence in the case.

"Viola and James Pemberton, husband and wife, when called by the prosecution, testified, in substance, that they had accompanied the defendant to his home on the evening of August 5, 1935, where they were to take dinner with the deceased and defendant; that upon arrival there they failed to find the decedent in the house whereupon defendant procured flashlights and suggested a search of the grounds and garden; that the defendant went to the back and James Pemberton to the front of the premises; that as the witness James Pemberton walked back through the shrubbery he saw the body of the deceased in and near the fish pond, with the upper part of the body and head (face down) submerged in the water; and that when the defendant was told of the gruesome discovery he cried and otherwise expressed his grief.

"John P. Toohey, a deputy sheriff, testified that he, in company with another deputy and in response to a summons, appeared at the scene at approximately 8:30 p. m., at which time he saw the body of the deceased near the fish pond; that at the time the head was in the water, face up (the discoverers undoubtedly having previously moved it); that the water was approximately 14 inches in depth; and that the body was so placed that he could see that the left leg 'was swelled and very blue'.

"A. L. Hutchinson, also a deputy sheriff, testified that when he arrived at the scene he 'noticed a cut on her [deceased's] left toe, her big toe on the left foot'; that the flesh of her left leg 'was very dark * * * and it was almost black between the ankle and the knee, very black'; that the 'whole [left] leg was black and blue from the ankle up to the knee and on the inside of the leg' and was 'some swollen'.

"Charles H. Hope, the defendant's confessed accomplice and who at the time was awaiting sentence upon his plea of guilty to the charge of murder, testified, as the state's principal witness, that he had known the defendant for approximately seven years; that when conversing with the defendant in the latter's barber shop in June, 1935, the defendant asked him if he had any knowledge of rattlesnakes, to which the witness answered in the negative; that the defendant thereupon stated that he had a friend who had a wife he wanted to kill and desired rattlesnakes for the purpose, adding that if he (Hope) would 'get me some rattlesnakes, I will give you \$100' and 'defray all expenses'; that subsequently he (Hope) bought three rattlesnakes in Long Beach and delivered them a few evenings later to the defendant at his home; that the snakes cost \$5 but the defendant paid him \$20 prior to their delivery; that the defendant then had him stay at his (defendant's) home for several days and while there had the witness go to town and have two boxes made for the snakes with sliding glass tops; that the boxes were approximately two feet long and nine inches high; that in July, 1935, he again talked with the defendant at his barber shop at which time the defendant said his friend was dissatisfied with the snakes because they were not fighters and that fighters could be procured at the Ocean Park Snake Pit; that thereafter he went with the defendant to said snake pit where the defendant conversed with the attendant and said 'that is the one I want'; that the following day the defendant sent him to purchase the snake so

designated; that the purchase was made and the snake was delivered to the defendant; that he next saw the defendant on August 3, 1935, two days prior to the homicide, at which [fol. 2705] time the defendant said that the snake was no good and that he wanted some fighters; that he (the witness) thereupon went to 'Snake Joe' at Pasadena and purchased two snakes which he delivered to the defendant; that the defendant said 'his wife [the deceased] had \$5000 worth of insurance and he was going to collect it'; that he went to the defendant's home on August 4, 1935, the day preceding the homicide, at which time the defendant stated that the witness was in as deep as the defendant; that defendant had him bring one of the sliding glass top boxes containing a snake from the garage into the house; that he came in the back way to the kitchen at which time he observed the deceased in her nightgown strapped or tied to the kitchen table and with adhesive tape, previously purchased by the witness at the defendant's request, fastened over her eyes and mouth; that the defendant told him he got the deceased, who was then pregnant, on the table under a ruse that a doctor was coming to 'perform some kind of an operation on her for pregnancy'; that while the deceased remained in this prostrate position the defendant put her left foot into the box containing the snake; that the witness then returned the box to the garage; that he later left in the defendant's car with the box containing the snakes and dead chickens, etc., which had fallen prey to the snakes in defendant's prior tests of their ability to destroy; that he then picked up his (the witness') wife at her place of employment and returned the snakes to 'Snake Joe' from whom they had been procured; that he threw the boxes out along the road; that he returned to the defendant's home about 1:30 a. m., August 5, 1935, the day of the homicide; that the defendant then appeared to have been drinking and told the witness that the snakes were no good and that his wife was not even sick; that the defendant thereupon jumped up and said, 'I am going in and drown her'; that the witness stayed in the automobile; that the defendant came out about 4:00 p. m. and said, 'That is that'; that at approximately 6:30 or 7:00 a. m., the defendant said the deceased had been dead since 4:00 a. m. and the house 'cleaned up'; that defendant then asked him to 'help me carry it' whereupon he accompanied the defendant into the house where he observed the deceased lying in the hall dead with her feet toward the bath-

room; that the defendant took the upper part of deceased's body and the witness the lower part and carried her 'towards the fish pond'; that the witness refused to put deceased in the fish pond as requested by the defendant but went instead to the automobile; that the defendant told him he would care for him 'when I get this money'; and that some time later the defendant gave him \$100 and instructed him to 'get out of town'. The witness thereupon identified three persons in the courtroom as the three men from whom on separate occasions he had purchased the snakes as above mentioned. His story was not materially shaken on cross-examination.

"Certain portions of Hope's testimony were corroborated by his wife who, among other things, testified that on August 3, 1935, she drove with Hope to a snake farm in Pasadena; that Hope took a box and went to the side of the barn where she saw him with 'Snake Joe', whom she identified when he arose in court; that the following morning she drove with Hope to within a block of defendant's home and Hope left her there, the witness driving back to Los Angeles alone; that Hope picked her up at work about 2:00 p. m. of that day (August 4th) in the defendant's car; that there were boxes in the back of the car; that they again drove out to [fol. 2706] the snake farm in Pasadena; that Hope took a box and went inside, returning several minutes later with 'Snake Joe'; that on the return trip Hope threw out two boxes with glass tops; that Hope left her after dinner and she did not see him again until the following morning (the morning of the homicide) when he appeared 'white and jittery and had been drinking.'

"Additional corroboration of portions of Hope's story appears in the testimony of the three persons from whom he assertedly purchased the several snakes. Roland H. Kirby testified that early in July, 1935, Hope came to him and said he was interested in experimental work and inquired if he had snakes 'with fangs and poison'; that Hope purchased three snakes and the witness gave him a jar of crystallized rattlesnake venom.

"Mike Allman, who operated a reptile show at Long Beach, testified that the defendant and Hope one day came to his snake pit; that they had been drinking and were noisy; that the defendant offered to bet that the witness had no poisonous snakes; that the following day Hope returned with a sliding glass top box and purchased a rattlesnake,

stating that he had lost \$100 to the defendant in a poker game and the defendant had offered to bet him \$50 that the witness had no poisonous snakes; and that upon being assured that a certain snake was poisonous, Hope purchased it to recoup a part of his card loss to the defendant. On redirect examination the witness stated that some time later and after their arrest, he had identified and picked out the defendant and Hope from a crowd of persons.

"Joe Houtenbrink, known as 'Snake Joe', testified that he operated a snake farm in Pasadena; that Hope came there on August 3, 1935 (two days prior to the homicide) and purchased two Diamond Back or Crotalus Atrox rattlesnakes for which he paid \$3.00; that Hope said he had a friend and 'he said he already bought some snakes from other places and they wasn't hot and he wanted a real hot one and he was told to come over to me to get the snakes, that I handled hot snakes'; that Hope explained he wanted the snakes to bite and kill a dog and thus win a bet; that Hope had a box with a glass cover on top for the snakes; that he saw Hope the following day about 3:00 p. m. (the day preceding the homicide) and that at that time he repurchased the snakes from him for half price. This testimony corroborates that of Hope and his wife.

[1] "At this point in the trial argument arose between counsel over the prosecution's proposal to bring into court the two snakes purchased by Hope from the preceding witness and which the district attorney declared were 'the actual snakes that were at the house that day'. Defense counsel vigorously opposed their production in court but the objection was overruled. The two snakes were thereupon produced in court confined in boxes. Defense counsel then insisted that the record show that the courtroom was assertedly thrown into a state of excitement and consternation by the production of the two snakes. However, in opposition to counsel's assertion, the record also discloses the statement of the trial judge that the decorum of the courtroom and the orderly conduct of the trial were not disturbed in any manner by the incident. Thereupon, 'Snake Joe', still on the stand, identified the two snakes so produced as the two he had sold to Hope two days prior to deceased's death and had repurchased from him one day prior thereto. According to Hope's testimony, at least one of the two snakes so identified, was employed by de-

defendant and him to inflict a poisonous bite on the deceased's left foot when it was pushed by the defendant into the box [fol. 2707] containing the reptile. In view of such identification of the snakes and their employment in the plan to bring about the death of deceased, we perceive no error in the trial court's ruling permitting the production of the snakes for the inspection of the jury. It is not uncommon upon a murder trial to offer in evidence as part of the res gestae the medium employed to bring about the violent or untimely death of the victim. In *People v. Bannon*, 59 Cal. App. 50, 56, it is stated that 'As a general rule physical objects which constitute a part of the transaction, or which serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under judicial investigation.' (See, also, *People v. Peete*, 54 Cal. App. 333, 348, and 8 Cal. Jur. 143, sec. 228.) Moreover, the production of the identical snakes tended to corroborate the testimony of prosecution witnesses and to otherwise support the case of the People. It might also be mentioned that if the production of the snakes in court caused the extreme state of excitation urged by the defense, it is difficult to appreciate why defense counsel at a later time in the trial and during the development of the case by the defense, again produced the snakes and thus risked a repetition of the situation of which complaint is here made.

"Returning to our discussion of the evidence, we find that the witness Irving Sherman, called by the People, testified to the effect that his father was in the cabinet business and that Hope on July 28, 1935 (several days prior to the homicide) ordered and had made two boxes with sliding glass tops. This item of evidence lends some credence to portions of Hope's testimony as well as to that of other prosecution witnesses.

"In support of Hope's testimony that he was with the defendant at his shop and at his home several times prior to the homicide, thus affording opportunity for the planning and carrying out of their scheme, there is the testimony of Lois Wright, the defendant's niece, that she had seen Hope at defendant's barber shop, where she worked, and also had seen him in July, 1935, at defendant's home.

"Sam Grant, a barber in defendant's shop, also placed Hope there on many occasions in 1935.

"Dr. A. F. Wagner, the autopsy surgeon, testified that he found a laceration on the surface of deceased's great

left toe; that her left foot was considerably swollen and discolored, the swelling extending up to the hip; and that deceased's lungs contained a considerable amount of water. He gave as the cause of death, 'drowning and an acute cellulitis [swelling] of the legs.' Cellulitis, he testified, is 'always due to an infection of some kind'; that cellulitis resulting from a bacterial infection would take from two or three days to a week to reach the extent it had in the deceased but that if caused by 'animal poisons' it would progress 'much faster'. He elaborated to the extent of saying that animal poisons capable of producing cellulitis such as the deceased had would be 'the venoms of insects and snakes, spiders, and so forth'. He further testified that the cellulitis present in deceased was not of the bacteriological type but was of the 'animal poison' type and 'could have been' caused by the bite of a snake. In addition, he testified that he again had examined the deceased's body in May, 1936, following its disinterment when criminal proceedings appeared in order, and that he was of the opinion that the laceration on the deceased's toe was caused by a rattlesnake bite.

"Dr. Gustave Boehme, who was present at the examination following deceased's disinterment, testified that he had [fol. 2708] made a special study of snakes and snakebites: that on deceased's great toe of the left foot he had discovered an 'old laceration wound approximately a quarter of an inch in length' which could have been caused by a number of things but, in his opinion, had been caused 'by some venomous creature, probably a snake, and all the other findings on the leg were compatible with such a finding', adding that the single incision was such 'as could be caused by a fang striking at an angle, perhaps'. In his brief the defendant concedes that this testimony is corroborative of Hope's story.

"Mrs. Ethel Smith, another niece of the defendant, testified, among other things, that the defendant had sent a trunk to her home for storage and that certain rope shown to her was in the trunk. Charles Griffen, an investigator for the district attorney, testified that he found the rope in the trunk. The significance of the testimony of these two witnesses lies in the fact that Hope when on the stand had previously identified the rope as being similar to that with which the deceased had been tied to the table when her foot was placed in the box containing the snake.

"In support of its claim that the motive underlying the deceased's untimely death was the collection of insurance moneys, the prosecution produced as a witness one Louis Berry, an insurance agent with the Mutual Life Insurance Company, who testified that he had been a customer at defendant's barber shop and had solicited him for life insurance; that defendant said he was not personally interested but knew a girl who might be interested in life insurance; that about two weeks later defendant inquired as to the cost of a \$5000, twenty or twenty-five year endowment policy on a girl 26 years of age, whose name he would not reveal; that defendant agreed to submit the matter to the prospect; that about one week later the defendant introduced the witness to the prospective client, Mary E. Busch, who later became the defendant's wife and for whose murder he now stands convicted; that on June 25, 1935, he delivered to her a \$5000 policy which named the defendant as beneficiary, that subsequently and on July 30th, he called on the defendant in response to the latter's telephone request and the defendant inquired as to the effect on the policy of a misrepresentation by the insured at the time of applying therefor that she was married, when, in fact, she was not (deceased and defendant had been living together at the time); that the defendant stated they were not married until July 19th, following the issuance of the policy; that he (the witness) checked the matter with the company and reported back to the defendant that the policy was not affected thereby; that one premium was paid on the policy; and that after the deceased's death the defendant inquired if the company would pay under the double indemnity provisions of the policy as a result of the accidental character of her death. On cross-examination the witness testified that the defendant had procured other prospective clients for him.

"Max Galatz, a representative of the Occidental Life Insurance Company, testified that late in May, 1935, he received two applications for insurance on the life of the deceased, one for a \$5000 policy and the other for a \$700 policy; that defendant was named beneficiary in both; that the defendant and deceased (contrary to the fact) said they were husband and wife at the time; that he told the defendant that he would have to have more insurance on his life than the deceased had on hers; that defendant said he had ample insurance in two or three companies but applied for [fol. 2709] a \$3000 policy on himself; that the policies were

issued and delivered about June 12th; and that only one premium was paid by the defendant on each of said policies, including his own. On cross-examination, the witness stated that in litigation which followed on the policies after deceased's death the defendant claimed under the double indemnity provisions but later settled for \$3500, which amount (less than the face value of the policies) was paid to the defendant. Defendant's testimony given during the trial of such action was read into this record by the phonographic reporter, from which it appeared that the defendant met the deceased about March 1, 1935; that they began living together early in May, 1935; that defendant, unknown to the deceased, had arranged for a mock marriage inasmuch as he could not then legally marry deceased because of the pendency of an annulment proceeding growing out of a previous marriage; that they thereafter became legally married on July 19, 1935; and that the deceased was in 'marvelous health' up to the time of her death. In connection with the two policies last above mentioned, the defendant two or three weeks prior to deceased's death likewise made inquiry as to the effect of the misrepresentation that the parties were married at the time of making application therefor.

"E. L. Taggart, an automobile salesman, testified that he met the defendant early in 1935 and that defendant then stated that he desired to buy a cheap car with the understanding that he could turn it in on a large Studebaker in a few months upon his receipt of \$10,000 from an 'estate'.

[2] "Madge Reed testified, in substance, that she met the defendant in the Italian Village on July 10, 1935; that he stated he was visiting from Kansas and was staying with his sister; that the defendant became intoxicated and asked her to drive him home, which she did; that while she was at his home, a woman who identified herself as his wife (the deceased) came home unexpectedly from a convention; that the defendant telephoned her several times thereafter, including a call two days prior to the deceased's demise; that defendant visited her at her apartment on August 11th (six days after deceased had died) and stated that they were trying to frame him for his wife's death but that he would collect her insurance money, marry the witness and they would go north; that defendant stated in the event of his indictment he wanted to use the witness as a surprise witness

and would give her \$2,000 if she would testify that she had met the defendant and deceased five weeks previously; that on the morning of deceased's death the witness had seen the deceased on her porch and that deceased had then complained of not feeling well, making particular mention of a sore leg; that she (the witness) and defendant registered that night at a hotel and talked over his troubles and the asserted attempt to frame him; that defendant had her make notes on a card as to how he wanted her to testify (briefly outlined above), whereupon the witness identified the card on which she had written the notes and also the hotel register. She further testified that defendant gave her \$60 at that time and promised her \$2000 later.

"We find no error in the rulings admitting and thereafter refusing to strike out the testimony of this witness. It tended in some degree to establish the motive advanced by the prosecution—collection of insurance money coupled with the purpose of marrying another woman. It also tends to disclose an effort on the defendant's part to establish an [fol. 2710] alibi in the event his foul deed came to light.

[3] "At approximately this point in the trial the prosecution was about to offer in evidence a statement or confession made by the defendant in the early morning hours of May 3, 1936, in the office of the district attorney and in the presence of several persons. Preliminary to such offer, however, and upon objection thereto by the defendant, the People undertook to establish that the statement or confession was the free and voluntary act of the defendant, uninfluenced by promises, threats or persuasions. Defendant, on the other hand, undertook to establish that the statement or confession was improperly extracted from him. As a result, much of the evidence on this phase of the case is highly conflicting, the defendant in many instances contradicting the People's showing. The conflict so created was resolved against the defendant by the trial court in the first instance upon its ruling admitting the statement or confession as the free and voluntary act of the defendant and by the jury in the second instance by its verdict finding him guilty as charged. However, in view of the vigorous presentation and argument of this point upon the present appeal, we feel justified in developing the matter at some length in order that the general state of the record in this respect may be known.

"The defendant took the stand on voir dire in an effort to show the asserted involuntary character of the confession and testified that he had been constantly questioned, threatened and beaten by the officers from the time of his arrest on April 19th, without a warrant, until he was 'booked' at the county jail on the 21st. He asserted that his ears were bruised and swollen and that he had suffered a hernia as a result of such manhandling. During this period he was assertedly proffered manslaughter punishment in exchange for a confession. His counsel testified that when he later saw the defendant in the county jail his ears were blue and swollen. Several depositions were offered by the defendant as tending to show that he was congenitally weak-minded and therefore more likely to capitulate to coercive methods than the average person.

"It appears from the testimony adduced by the People that the defendant was placed under observation in April, 1936, for suspected incest involving his niece, at which time the authorities uncovered and developed the criminal character of deceased's death which had occurred several months prior thereto. As a result of these developments the defendant was arrested on April 19, 1936. He was not taken without delay before a magistrate nor was he immediately incarcerated in the county jail as required by sections 849 and 1597 of the Penal Code. Instead, and after some preliminary questioning in the office of the district attorney, he was taken by the officers to a private home, adjoining that where the defendant had been living with his niece, and where admittedly he was held incommunicado for a period of about forty-eight hours, during all of which time he was admittedly subjected to incessant questioning by the officers who worked in shifts. The defendant was apparently deprived of rest and sleep during practically all of such period. At least, the prosecution failed to offer any positive testimony that defendant during this period was afforded an opportunity of going to bed, a privilege concededly enjoyed by the examining officers. In addition, one of the officers testified that during the questioning he became angered and 'slapped' the defendant's face when the defendant was said to have referred to the deceased as a 'whore'. Other than [fol. 2711] subjecting defendant to constant questioning, and the 'slap' administered to him the several officers categorically denied that any threats or promises were made to or

any physical beatings were inflicted upon the defendant during the two-day period he was being held and questioned in the private house. Charles Griffen, the assistant chief of the bureau of investigation in the office of the district attorney, while admitting the continuous course of questioning of the defendant during this period, testified that other than the slap mentioned, no force or violence was employed on the defendant; that the defendant was calm and collected; and that he appeared unafraid and answered questions (other than admitting the crime) readily and rationally.

"Everett Davis, another investigator for the district attorney, denied that the defendant was offered a lighter punishment if he would confess and testified that the defendant was told no one could offer or promise him anything but if he wanted to tell the story they would listen. He added that of his own knowledge, the defendant slept from 3:30 to 8:00 a. m., April 21st, in a chair with his feet on a second chair. Two other officers likewise denied defendant's statement of threats and violence during the period April 19th to 21st, one of whom testified that defendant explained receiving the hernia in an automobile accident. Three deputy sheriffs, who saw the defendant (stripped and otherwise) in the county jail on and subsequent to April 21st testified, in substance, that they saw no bruises, marks or discolorations on defendant's body or head and that he made no complaints as to his treatment or condition.

"It is apparent, therefore, that the evidence is sharply conflicting on this phase of the case, other than that showing continued questioning of the defendant throughout the period of April 19th to 21st, during which an ill-advised slap was administered to him, and for all present purposes the conflicts therein must be presumed to have been resolved against the defendant by both the trial court and the jury.

"Regardless of the impropriety of holding and continuously examining the defendant for many hours in a place other than a county jail prior to the filing of any charge against him, a course which we expressly disapprove, it is of the utmost significance that a confession was neither obtained nor extracted from the defendant during such period. The record definitely discloses that this treatment of which defendant here complains failed of its asserted objective. In other words, no matter how improper the treatment of defendant between April 19th and 21st, a confession did not result therefrom. It was not until May 3,

1936, twelve days later, that the confession sought to be introduced was obtained. In this respect, the evidence shows that the defendant was removed from the private house where he had been held and booked at the county jail on April 21st. One of his counsel took the stand and testified that he saw the defendant in the county jail on April 25th, at which time he instructed the defendant not to answer any questions in his absence. On cross-examination, said counsel admitted that he saw the defendant 'when he was arraigned' on April 21, 1936. It is apparent, therefore, that the defendant was not held *incommunicado* when the confession was forthcoming. He had enjoyed the benefit and association of counsel and had been before the grand jury and the court. It is also of the utmost importance that [fol. 2712] the defendant did not confess until after Hope, his accomplice, had been arrested on May 1st and had told the story to the officers in charge of the investigation. The defendant's confession followed within two days thereafter. Defendant testified further on *voire dire*, however, that he still suffered from the pain and memory of the prior beatings assertedly administered to him; that he was afraid to follow the advice of his counsel and continue to refuse to answer questions or to deny the statements of the officers as to the manner of the commission of the homicide; that the officers accused him of lying and threatened to take him back to the house and 'beat your God damned head off'; that he could not take another beating and therefore offered to 'gladly admit it [Hope's story] and save myself other punishment'. On cross-examination, he admitted that he did not confess following the alleged beatings administered to him by the officers during his confinement in the private house from April 19th to 21st and he also admitted that no threats, promises or beatings preceded his statement and confession in the district attorney's office on May 2d and 3d.

"Chronologically, the circumstances leading up to the confession were narrated by certain of the officers, as follows: Williard L. Killion, a deputy sheriff, testified that on the morning of May 2d, he took the defendant from his cell in the county jail to the chaplain's room; that many persons were there; that no one made any promises or exerted any coercive influence to induce the defendant to talk; that an unsuccessful effort was made to locate defendant's counsel, as requested by him; that all statements

thereafter made by the defendant were free and voluntary and without objection on his part that his counsel was not there: and that Hope was brought into the room.

“Edward F. Lynch, who reported the proceedings at this meeting, testified that deputy district attorney Williams related Hope's story to the defendant and asked the defendant if he had anything to add thereto and the defendant replied ‘Nothing’. This session ended at 11:50 a. m. on May 2, 1936, whereupon the defendant was returned to his cell. Later in the day and pursuant to court order, he was taken to the scene of the homicide by a deputy sheriff. Still later, he was returned to the office of the district attorney where he answered questions in the presence of several persons. Robert P. Stewart, the chief deputy district attorney, testified that the district attorney principally examined the defendant during the afternoon of May 2d; that Hope was brought in during the session; that no promises or other improper influences were exerted over the defendant; and that defendant was rational and coherent at all times. Along about midnight the defendant was taken out to a restaurant by Killion, the deputy sheriff, and two others. While in the restaurant, the defendant, according to Killion's testimony, voluntarily unburdened himself as to the commission of the crime. In this narrative the defendant told of plotting with Hope to kill the deceased and to collect and share her insurance money. However, throughout his statement of the circumstances surrounding the commission of the crime, the defendant charged that Hope was the principal actor in the consummation of the crime. It was Hope, he said, who placed the deceased's foot in the box for the snake to bite and who later drowned deceased in the bathtub and placed her body in the fish pond. The defendant during this statement also admitted that he had had the deceased write a letter to her sister complaining of a sore foot and leg, which letter was found, [fol. 2713] unmailed, in the deceased's home on the evening of her death by the Pembertons and the defendant immediately after they had discovered her lifeless body. This letter was offered in evidence by the prosecution and there is evidence, conceded in the defendant's brief, that it was not in the deceased's normal handwriting. The inference was available to the jury that the defendant had compelled its writing, a fact later admitted by him in his confession, to furnish, if possible, an alibi.

"At the conclusion of this restaurant statement, the defendant was returned to the office of the district attorney where, between the hours of 1:30 and 3:30 a. m. May 3, 1936, according to the testimony of several there present, the defendant freely and voluntarily detailed the circumstances of the crime in a confession which the prosecution thereupon offered and had admitted in evidence.

"It cannot be said, under all of the evidence, that the court below erred in admitting the defendant's reply to the accusatory statement and his confession as free and voluntary acts on his part. It is declared in *People v. Lebew*, 209 Cal. 336, 341, that 'Whether a confession is free and voluntary is a preliminary question addressed to the trial court, and a considerable measure of discretion must be allowed that court in determining it. * * * In *People v. Siensen*, supra, 194 Cal. 595, it is declared that the "admissibility of such evidence so largely depends upon the special circumstances connected with the confession, that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed, in the first instance, to the [trial] judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forbore to mark with absolute precision the limits of admission and exclusion." The mere fact that the confession was made to a police or other officer of the law while the accused was under arrest, does not necessarily render the confession involuntary and inadmissible. So, also, the mere fact that a confession is made in answer to questions will not authorize its rejection, though the fact of its having been so obtained may be an important element in determining whether the answers were voluntary * * * a reviewing court cannot say that the trial court committed error in admitting a confession of guilt unless such error appears as a matter of law from the record presented. The trial court is clothed with considerable discretion in determining whether or not the confession was free and voluntary, and where the evidence is conflicting on the subject, it must be assumed that the testimony concerning a defendant's admission was properly admitted.'

"In the present case the testimony is overwhelming to the effect that during May 2d and May 3d, when the statement and confession were made, no promises, immunities, threats or forms of violence were employed to overcome the free will of the defendant. This is corroborated by defendant's

own testimony. That he was questioned for many hours is not, of itself, improper, particularly when, as testified, he freely responded thereto. Some recognition must be given to the practical problems presented in the work of crime detection. A reasonable conclusion, and one which the trial court and jury might have readily reached on all the evidence, is that the defendant broke down and confessed his participation in the crime only after his confederate and accomplice had been arrested and detailed the murder conspiracy and had been brought face to face with the defendant who had been informed of the details of his confederate's story. Each case must turn on its own facts and we therefore give but passing mention to the authorities relied on by the defendant.

[4] "Turning our attention now to the substance of the confession, and eliminating many unnecessary details, we find defendant relating that early in July, while the deceased was away for a few days at a convention, he and Hope planned to kill her and to share equally in the proceeds of her insurance policies; that Hope first suggested a false hold-up in which deceased would be shot, but they later agreed on Hope's second suggestion of permitting a rattlesnake to bite her in the hope that the infection would prove fatal; that he gave Hope \$20 and the latter had 'certain kinds of boxes made' and brought snakes up to defendant's home in them; that Hope brought three the first time and two the second, all of which proved unsatisfactory upon experimentation with chickens, rabbits, etc.; that two days before the deceased's death he gave Hope \$6 to purchase two 'hot' snakes Hope had reported seeing; that these snakes were procured and kept in boxes in his garage over Saturday night (Aug. 3, 1935); that the conspirators did some drinking with deceased that night and discussed an abortion which it was claimed she desired and believed that Hope, as an asserted medical student, was to perform the following day; that Hope left and returned the next morning about 11:00; that he gave Hope all the money he had, about \$100, and left about 1:00 p. m. because deceased 'had been too good to me and I just couldn't have anything to do with that part of it'; that Hope said deceased would die in about one hour; that he (defendant) returned about 4:00 p. m. and found Hope intoxicated and that Hope had deceased 'full of liquor'; that Hope told him he had put her

foot in the box containing a snake; that Hope left and returned at 6:00 a. m., Monday, August 5, 1935; that he suggested calling it off but Hope said they had gone too far to stop; that at Hope's suggestion he left for his barber shop with the understanding that Hope would 'care' for the deceased, who was still alive, by burning the 'house up'; that Hope came to the shop about 1:00 p. m. and reported that he had not burned the house but had thrown deceased 'in the bath tub and drowned her' and then placed her body in the fish pond; that he upbraided Hope for 'the worst thing you could have done' because he [defendant] 'had a wife drown in a bath tub in Colorado Springs a little while ago'; that he told Hope 'there ain't enough men in the District Attorney's office to make me talk', adding 'and there wasn't if he [Hope] had not told it'; that he then arranged to have the Pembertons, who were innocent of the situation and whose testimony is related above, go home with him; that when he left for his shop on Monday morning he did so with the idea that deceased 'was to be murdered by Hope' and they were to share equally in the proceeds of her insurance; that the snakes were purchased for that purpose and deceased, as a ruse, was informed a desired abortion was to be performed; that after deceased's burial and while intoxicated, he may have offered the Reed woman a \$1,000 to say she saw deceased alive in her yard on the day of her death; that the letter above referred to was written by deceased while intoxicated and under his direction; and that his statements were 'the true stuff' and made freely and voluntarily. During this session, Hope was brought in to the room and confronted the defendant.

"With the foregoing evidence before it the jury had ample support for its verdict. In his confession the defendant [fol. 2715] admitted his participation in the death of deceased, though he again undertook to point to his accomplice as the principal actor. Under settled principles, this would not, however, serve to relieve him from full responsibility for the homicide which he and his accomplice planned and perpetrated.

[5] "In addition to the evidence above narrated, and as tending to prove that the death of deceased was not the result of accident, as it at first appeared, but was deliberately planned and executed in order to collect insurance money payable on the death of the victim, the prosecution offered

evidence tending to show that a former wife of the defendant, equally heavily insured in favor of the defendant, while recovering from serious injuries incurred in an automobile accident in 1932, which the defendant survived with but little inconvenience, was likewise found drowned in the bathtub of their home with resulting monetary benefit to the defendant. In making the offer of proof in the absence of the jury, the district attorney stated that he would adduce evidence tending to show that the defendant struck his former wife on the head with a blunt instrument and then ran the automobile in which they were riding off the Pike's Peak Highway and the victim not having died from the injuries -so incurred was later and while recuperating, drowned in the bath tub. This evidence, hereinafter briefly narrated, in our opinion, was sufficient, *prima facie*, to indicate that defendant had been a party to the death of a former wife under somewhat similar circumstances and it was apparently offered and admitted as tending to show common plan or scheme in the execution of two homicides and an absence of accident in the deceased's untimely demise. Defendant unsuccessfully objected to the admission of this evidence on the ground that it would fail to establish any of the elements of the offense for which he was on trial and would serve only to prejudice him before the jury.

"In support of its offer of proof the prosecution produced several witnesses. The first, J. D. Rogers, superintendent of the Pike's Peak Highway, testified that he first saw the defendant about 7:00 p. m., September 21, 1932, at Glenn Cove, Colorado, where the defendant reported that he had been in an automobile accident; that defendant's clothes were 'neat' and not soiled or disarranged; that he drove the defendant back to the scene of the accident, the defendant stating that he 'really don't know how it happened' as his (former wife had been driving coming down the mountain while he was looking across the valley with field glasses; that defendant said the car suddenly left the road and that he (defendant) jumped from the car after it had travelled about fifty feet down the mountainside; that the car came to rest against a large boulder one hundred and fifty feet below the road; that he (the witness) found the deceased lying on the *right hand side* of the car (though she was supposed to be driving on the left side) with her

head down hill and her feet on the running board of the car; that her clothes were free of dirt; that the car rested on its wheels; that there was considerable blood *inside* the car, especially on the back of the cushion on the *right* side and on the floor boards; that a hammer on the floor of the car was covered with blood; that he smelled liquor from the deceased and felt a softness behind her ear when he lifted her; that there were foot prints back about eighty feet where the car left the road and on either side of the tire marks, some pointing to where the car went off the road; [fol. 2716] that the defendant's car was the last one to come down the mountain that particular evening, all others having checked out ahead; and that the defendant appeared quite calm.

"Miss Grace Yarnell, a cousin of this former wife of the defendant, testified that she had visited the injured woman while she was recuperating in the hospital, which covered the period from September 21 to October 8, 1932; that she saw the injuries over her cousin's right eye and back of her ear; that after October 8th she saw the injured person in a cottage in Manitou Springs, Colorado, where defendant had moved her prior to complete recovery; and that defendant had told her he was thrown free of the car and had lifted his (former) wife from the car and placed her on the ground with blankets about her.

"Gerald Rogers testified that he worked in the local grocery store in Manitou Springs; that defendant came to the store about 5 p. m. on October 14, 1932, ordered some groceries and asked that they be delivered; that defendant then said that he would ride home with the witness; that he (the witness) went into the kitchen and the defendant went into the bedroom and then to the bathroom; that defendant then called him and he saw defendant's wife lying on her back in a half-filled tub of lukewarm water. On cross-examination, it appeared that the defendant had ridden home with him on prior occasions.

"Dr. George B. Gilmore testified that he was coroner in 1932; that he saw defendant's (former) wife on October 14, 1932; that she was then on a bed and dead; that defendant said he had been away from home for several hours at the time of her death; that the defendant related that the doctors in the hospital had theretofore warned deceased against washing her hair because of her head injuries but

that she apparently had undertaken it in his absence and drowned as a result; and that he (the witness) suggested an autopsy but defendant opposed it, saying he 'couldn't permit anything of that sort.' The doctor then identified certain letters subsequently addressed to him by the defendant requesting a change in the death certificate in order to show that the drowning was attributable to the injuries received in the earlier automobile accident (apparently to facilitate collection under the accidental and double indemnity provisions of the insurance policies).

"Mrs. Irene F. Snyder, bookkeeper at the hospital, testified that defendant's former wife was there confined from September 21 to October 8, 1932, and that the defendant had stated at the time that he was without funds to pay the bill but intended negotiating a loan on an insurance policy. There is other evidence that defendant was financially embarrassed and had borrowed money about this time.

"The prosecution produced Doctor Decker, concededly qualified to express medical opinions, and who examined and interpreted certain X-ray photographs theretofore taken in the Colorado hospital, who testified that, in his opinion, the defendant's former wife suffered fractures of the skull from two blows, one on the side and the other on the front of the head; that the fractures had been caused by a hard, moving object being projected against the head and not by the head being projected against a hard, stationary object; and that the blow on the side of the head had been received first. That this evidence tends to support the prosecution's theory of a felonious assault on defendant's former wife must be admitted and defendant concedes in his brief that it was for the jury to weigh this [fol. 2717] evidence as against his conflicting medical testimony touching the same subject.

"John A. McKelvey testified that when defendant purchased a car from him in 1932, he stated that his previous car had been wrecked when the steering knuckle broke and the car went off the Pike's Peak road *as he was driving*.

"C. A. Pries, who was with the Prudential Life Insurance Company in 1932, testified that the defendant at that time told him he had an insurance prospect for him; that he later met Miss Winona Wallace (who subsequently became defendant's wife and, as shown, was found drowned

in the bathtub of their Colorado home) at defendant's apartment; that defendant said he wanted a \$5,000 policy on himself and a similar policy on the lady; that the defendant asked if he could be named beneficiary in the latter policy and was informed that this was not possible until the parties were married; that the two policies were later delivered, the defendant being named beneficiary in the lady's policy; that upon the death of the lady (who, as stated, had prior to death married defendant) the defendant asked for double indemnity payment under the policy; and that the defendant only carried his own policy for three months. The witness thereupon identified a check sent later to the defendant in payment of his claim under the policy.

"Bayard Judd, who was with the Kansas City Life Insurance Company, testified that just prior to the death of Winona Wallace James (defendant's former wife), she and defendant had sought an immediate loan on that company's policy covering her life.

"We find no error in the trial court's admission of this evidence touching the Colorado incident involving the death of a prior wife of the defendant under circumstances similar in many respects to the circumstances surrounding the death of the deceased for which he was on trial. In each instance the defendant had placed his asserted victim in touch with insurance agents with a view to and ultimate procurement of life insurance on her. In each instance defendant inquired whether he might be named beneficiary when the parties were not married. In each instance he received a negative reply and thereafter married the asserted victim. In each instance a policy or policies were issued naming him as beneficiary. In each instance the insured was shortly thereafter found drowned in or near the home she occupied with the defendant under circumstances having an appearance of accident but upon full and close inspection tending strongly to indicate foul play. In each instance the defendant claimed under the accidental double indemnity provisions of the policy or policies and, in each instance, ultimately profited financially by the collection of his wife's insurance.

"In view of these many similar and unusual circumstances, we are of the view that the evidence of the Colorado incident was admissible not to prejudice the defendant by proof of the prior commission of another crime but as tending to establish that the death of the deceased in the

present action was not accidental, as it might at first appear, and as claimed by the defendant, but was the result of a general plan or scheme on the defendant's part to insure, marry and murder his victims in order that he might thereby profit financially. In its instructions to the jury, several of which were requested by the defendant, the court below properly limited the purpose for which it might consider this evidence. That evidence of prior similar acts and crimes is admissible for the purposes already mentioned, is now well established. (*People v. Stutsman*, 66 Cal. App. [fol. 2718] 134; *People v. Barnes*, 111 Cal. App. 605; *People v. Morani*, 196 Cal. 154, 160; *Holt v. U. S.*, 42 Fed. Rep. [2d] 103, 106-107; *People v. Gosden*, 6 Cal. [2d] 14, 24. See, also, the English 'bathtub' murder case, *R. v. George Joseph Smith*, 21 Crim. App. Rep. 229, 236.)

"The *Morani* case, *supra*, contains the following: "'In the case of *People v. Seaman*, 107 Mich. 348, 61 Am. St. Rep. 326, 65 N. W. 203, it is said: 'Upon principle and authority it is clear that where a felonious intent is an essential ingredient of the crime charged, and the act done is claimed to have been innocently or accidentally done, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result as tending to show guilty knowledge, and the intent or purpose with which the particular act was done and to rebut the presumption that might otherwise obtain.' " "

"It is stated in the *Holt* case, *supra*, that 'No good purpose would be served by a review of the myriad of cases where evidence of other and collateral transactions has been admitted to prove the *quo animo*, scienter, motive, or intent of the defendant in the doing of a particular act; nor in restating the circumstances under which such evidence may strongly tend to support the charge made. Many of the authorities would be inapplicable to the present case, for there the evidence was introduced to show knowledge, while here its purpose is to negative the claim of accident and the alleged innocent motive, injected into the case by the defendant himself. It is sufficient to say that from the earliest times the propriety of admitting evidence for the purpose here stated has been fully recognized. * * *

" 'When introduced to show intent, or repel the possibility of accident or mistake, the time of occurrence of the

collateral circumstance is immaterial. Such duplication of the same situation is just as abnormal after the time laid in the indictment as before. Accordingly it is held that evidence of the collateral circumstance after as well as before the alleged commission of the crime may be admitted. * * *

The courts generally use the phrase "at or about the same time," but it is clear, we think, that the length of the separating interval, and the fact that evidence of but one other similar instance was here proved, go only to the weight of the evidence, not to its admissibility. * * *

In each case the question is, and of necessity must be, whether the evidence tendered has probative effect, logically and under the doctrine of chances. If it has, and we think such is the case here, it should not be excluded simply because it also shows the commission of another crime. This last fact is immaterial.'

"In the Gosden case, *supra*, the evidence tended to show that approximately six years prior to the death of his wife for which defendant was then on trial, a former wife of the defendant came to an untimely death under somewhat similar circumstances. We there declared that 'Turning now to the questions of law raised by appellant, the first contention made is that the trial court erred in admitting evidence of the death of appellant's former wife, Vivian Taylor Gosden. It is not necessary to repeat the evidence to show the similarity of the circumstances surrounding the deaths of appellant's two wives. This evidence tended to show that each died of strychnine poisoning, each was insured with the appellant as the beneficiary, and in each case the appellant attempted immediately upon the death of the wife to collect the insurance upon her life. The evidence as to the death of the first wife and the fact that her life was insured with the appellant as beneficiary was properly admitted to show the motive of appellant in the murder of his second wife. (People v. Northcott, 209 Cal. 639, 652, 289 Pac. 634, 70 A. L. R. 806.)'

[6] "Nor do we think that in the present case the prosecution was required, as urged by defendant, to prove the elements of the asserted Colorado crime beyond all reasonable doubt, as would be the case were the defendant standing trial for such asserted earlier offense. In this connection it is declared in *Land v. State*, 190 N. E. (Ind.) 850, 853, that 'It is only the ultimate material facts to which the rule of reasonable doubt applies. The facts regarding

the other transactions were simply evidentiary facts introduced for the purpose of being considered, together with all of the other evidence in the case, upon the question of criminal knowledge and intent; and though the jury may have entertained some reasonable doubt as to some of the other transactions, or some of the other items of evidence, which tend to prove guilty knowledge or intent, if, notwithstanding that fact, and having considered the evidentiary facts, doubtful and otherwise, they were convinced beyond a reasonable doubt of the ultimate fact of guilty knowledge and intent, it is sufficient.'

'In 1914, Ohio adopted a contrary rule when in the case of *Baxter v. State*, 110 N. E. 456, to which the defendant refers us, it was declared that 'Evidence that an accused was guilty of other similar offenses must be such that a jury would be authorized to find him guilty of these offenses.' However, defendant has failed to note that in the later case of *Scott v. State*, 141 N. E. 19, 26, the Ohio court renounced the rule of the *Baxter* case, declaring: Is the rule in the *Baxter* case based upon sound reason? It has long been the general rule that a conviction is warranted if on the whole evidence the jury is satisfied beyond a reasonable doubt that every material element charged in the crime exists and that the defendant is guilty of the crime charged. In other words, it is the holding that the state need not establish each particular fact of the case beyond a reasonable doubt, if it establishes beyond a reasonable doubt the existence of every material fact alleged in the indictment and the guilt of the defendant. * * * If testimony with regard to other similar crimes is to be dealt with as other evidence, it falls under this general rule and need not be discarded simply because particular items tending to prove other similar offenses are not established beyond a reasonable doubt, so long as the jury, from the whole testimony, are convinced to a moral certainty of the guilt of the defendant of the crime charged and of the existence of every material element necessary to establish that guilt.

'That this common sense view of the situation obtains in certain other American jurisdictions is shown by the fact that while the case of *Baxter v. State*, supra, is the leading case which lays down the doctrine here discussed, it is by no means universally followed in its exact terms. While the *Baxter* case is frequently cited, the degree of proof required in this class of testimony is held on excel-

lent authority to be positive or substantial, but not "beyond a reasonable doubt".

"In effect, we recently held in *People v. Thorne*, 10 Cal. (2d) 705, 708, that evidence which merely *tends* to show an attempt to commit or the commission of other offenses is admissible to prove common scheme or plan even though it falls short of proving the corpus delicti of such other [fol. 2720] offenses. In so concluding, we quoted from *People v. Whiteside*, 58 Cal. App. 33, 38-41, to the effect that 'If viewed with respect to its relevancy as tending to show that the facts constituting the charge contained in the information were a part of a scheme to defraud the public as distinguished from a single individual, it was not necessary in order that Stivers' testimony be admissible that an attempt be shown to have been made to sell him any stock or that the evidence, if accepted as true, should tend to show the commission of an offense like in character to the one charged. * * *

"We also there quoted from *People v. Sindici*, 54 Cal. App. 193, 196, to the effect that 'Where the very doing of the act charged is in issue [as here] and is to be evidenced, one of the essential facts admissible is the person's plan or design to do the act. This plan or design itself may be evidenced by his conduct, and such conduct may consist of other similar acts so connected as to indicate a common purpose including in its scope the act charged. * * *

"In *People v. Baker*, 92 Cal. App. Dec. 370, 372 [25 Cal. App. (2d) 1] it is declared in part that 'It is not essential that such similar transactions shall have resulted in the commission of a crime. It is sufficient if they tend to prove a scheme of the defendant which included the acts charged.'

"In view of what has been said we are of the opinion that upon its offer of proof of the prior and in many respects similar Colorado incident, the prosecution made a substantial showing tending to prove that on that occasion (as well as on the one here under review) the defendant had financially benefited by the untimely drowning at home of his wife on whom, as here, he had previously procured insurance in which, as here, he was named beneficiary. Upon this substantial offer, later supported by the proof above narrated, the court below correctly admitted the evidence touching the prior incident in order that the jury in its weighing of the entire evidence might determine whether it tended to show a common plan or scheme on the defend-

ant's part or tended to overcome the asserted element of accident involved in the death of the subsequent wife, for which death he was then on trial.

"But, even if we assume, as defendant would have us do, that the authorities require the asserted prior Colorado homicide to be proved beyond all reasonable doubt, no prejudice could have resulted to the defendant from the admission of the evidence for the court below, concluding that the rule as is now being assumed, instructed the jury that it must believe beyond all reasonable doubt that defendant's former wife was murdered before it could consider the facts of that transaction in connection with the case at bar. It is to be assumed that the jury abided by the instructions given by the court.

"In an effort to show that the deceased was alive on Monday morning, August 5th, when according to Hope's story she was dead, defendant produced a neighbor who testified that when he was in his yard at 9:25 a. m. on said morning he saw a mature, blonde woman, approximately five feet eight inches tall, wearing a rust colored smock, in the defendant's yard; that he had seen a woman in the yard on previous occasions but could not say it was the same one; and that he had never met the deceased nor had she been pointed out to him. Even if it be conceded that the person so described by the witness bore a resemblance to the deceased, the matter was one for the jury to resolve along with all other conflicts in the evidence.

"The defendant's sister testified that she visited with [fol. 2721] him and the deceased early in July, 1935, and saw Hope there on several occasions; that she heard the deceased state she desired an abortion whereupon the defendant said Hope would 'take care of her'. The witness also testified that during 1933-34 the defendant had loaned her several hundred dollars. This evidence was apparently offered for the purpose of overcoming the prosecution's showing that defendant was financially embarrassed and in need of the deceased's insurance moneys.

"Defendant also called one of the barbers in his shop who testified he saw the defendant on August 5, 1935 (after the killing but prior to the finding of deceased's body), and that he appeared normal, was not intoxicated and did not exude an odor of liquor. This testimony obviously was intended to rebut portions of Hope's testimony, particularly that part to the effect that during and immediately following the

commission of the homicide he and the defendant had imbibed rather freely of liquor.

"The defendant also produced a naturalist who expressed his views as to the habits of snakes, their average life when held in captivity and the effect of snake bite upon human beings.

"The defendant took the stand in his own defense and denied Hope's story that they had planned to murder, and had murdered, the deceased, by means of rattlesnake infection, drowning, or otherwise. He did testify, however, that Hope came to his home on July 3, 1935, in an intoxicated condition and expressed a desire to stay; that he told Hope to return sober the following day; that Hope, at the time, had with him a box of rattlesnake venom (which tends to corroborate portions of the prosecution's testimony to the effect that Hope was at the defendant's home and possessed reptile venom); that on July 6th, Hope came to his barber shop and again asked leave to stay at defendant's home; that he gave Hope the key and he came that night and stayed several days; that he introduced Hope to the deceased, his sister and his niece as 'Dr. Smith'; that at one of the breakfasts the parties discussed the pregnancy of the deceased and deceased during the course of the conversation stated that she could not go through with the ordeal of child-birth and that 'Dr. Hope will take care of me' (though earlier defendant had testified he introduced Hope as 'Dr. Smith'); that he saw Hope again on August 3d (which corroborates Hope's story of being with defendant two days prior to the homicide) but that Hope did not deliver any rattlesnakes to him; that Hope came to his home on August 4th (the day prior to the homicide) to abort the deceased (again corroborating Hope as to being at defendant's home at that time); that he did not approve of an abortion and left home while Hope 'cared' for deceased; that Hope left about 1:00 p. m. of that day and he did not see him again between that time and the time of the asserted drowning of deceased the following morning; that while he aided the deceased in taking out insurance on her life he did not do so with any thought of thereafter murdering her and collecting the same; that he did not cause the deceased to write the unmailed letter to her sister, found in the house and referred to above, but in his 'confession' had admitted so doing because one of the officers required it; and that on the day before her death the deceased stated to him that she had cut her foot on a

tin can while walking barefooted in the yard (this apparently to explain the laceration on her foot which the prosecution contended was inflicted by the fang of a rattlesnake). On cross-examination the district attorney confronted the [fol. 2722] defendant with his inconsistent statements made to the police on August 7th, two days after deceased's demise, and several months prior to his arrest therefor, to the effect that she had not mentioned a cut or swollen foot to him. Inconsistencies between his testimony and prior statements to friends as to the movements of deceased and himself on Sunday, the day preceding her death, appear in the evidence. In rebuttal of his testimony that he opposed the abortion which deceased assertedly desired, the prosecution recalled Mrs. Pemberton, the friend who was with her husband and defendant when the body was found, whereupon she testified that a few days before the deceased's death the defendant told her (the witness) that deceased was 'crazy to have a baby, but I don't want one'. We will not undertake to set out additional inconsistencies in statements of the defendant. These were matters for the jury to determine in its consideration and evaluation of the entire evidence. The jury was fully instructed on the law and no complaint is here made of any of the instructions.

"The entire record has been examined and all contentions advanced have been considered. Reference to other items of evidence not here mentioned would neither add to nor detract from the conclusion here reached. Sufficient has been said to illustrate that the verdict finds ample support in the evidence and that the judgment entered thereon should remain undisturbed."

[7] In the briefs filed before the former opinion was rendered, appellant made no claim that any error had been committed in the giving or refusing of instructions to the jury. Appellant filed his petition for rehearing but made no such claim therein. Such claim was first advanced in a supplemental brief filed by appellant shortly before the oral argument on rehearing. An appellate court is ordinarily justified in ignoring points so tardily raised but, owing to the nature of this case, we have reviewed the entire charge to the jury, giving particular attention to appellant's claim of error with respect thereto.

The challenged instruction was one of several given on the subject of the necessity for corroboration of testimony

of an accomplice. (Pen. Code, sec. 1111.) This particular instruction was given for the purpose of advising the jury of the character of testimony which might constitute corroboration. Appellant's attack is directed solely at the first sentence of this instruction which reads as follows: "You are instructed in this case that as Charles Hope is an accomplice or co-conspirator of the defendant in the murder alleged in the indictment, it is necessary that his testimony be corroborated." The instruction then continues at some length defining corroboration. It concludes "and so in this case, if you find, beyond a reasonable doubt, that the state has proven that the crime of murder was committed by the defendant, as charged in the indictment, and there is any corroboration of the testimony of the witness, Hope, of any character, falling under the definition of corroboration and the illustrations called to your attention in this instruction, then it will be your duty, under the law, to find the defendant guilty as charged".

When this instruction is read as a whole, and more particularly when it is read with the other instructions given, it is impossible to believe that the jury understood, as contended by appellant, that the court was instructing the jury that defendant had murdered the deceased and that Hope had assisted. In an instruction which was given before the challenged instruction, the court instructed the jury at the request of appellant that "Charles Hope is an accomplice [fol. 2723-2738] in this case if the crime of murder is committed and his testimony, uncorroborated by other evidence, which of itself tends to connect the defendant with the commission of the crime, is insufficient to sustain a conviction. Therefore, if you and each of you believe the testimony of Charles Hope to be true, still you cannot convict the defendant unless you find other evidence which shall, without the testimony of Charles Hope, tend to connect the defendant with the murder of Mary James."

In addition to these instructions, the trial court gave several other instructions on the subject of corroboration, which last mentioned instructions are not challenged. The court further gave the usual instructions to the effect that the defendant was presumed to be innocent until the contrary was proved beyond a reasonable doubt; that the jury was the sole and exclusive judge of the weight of the evidence; and that it was *was* its duty "to determine all questions

of fact arising from the evidence". The court further instructed the jury, that it could not convict the defendant "unless you, and each of you, is satisfied beyond all reasonable doubt, that he killed and murdered Mary James".

Appellant has taken but a single sentence from one of the numerous instructions given to the jury and has sought to claim that the giving of said single sentence constituted prejudicial error requiring a reversal. A review of the entire charge to the jury and of the entire cause, including the evidence, convinces us that the error, if any, in the giving of the challenged instruction was not prejudicial. This conclusion finds support in the fact that appellant's counsel, after conducting the trial and reviewing the record for the purpose of presenting the cause on appeal, failed to find anything in the instructions given which he deemed of sufficient importance to call to the attention of the court in his briefs presented prior to the time that the rehearing was granted.

The judgment and order are, and each is, affirmed.

DISSENTING OPINION

I dissent for the reasons stated in the dissenting opinion filed in this action at the time of the rendition of the former opinion. This dissent is set out in full in volume 89 (2d) of the Pacific Reports at pages 54 to 108 thereof. (People v. Lisenba.)

Curtis, J.

I concur:

Houser, J.

• • • • •

[fol. 2739] IN SUPERIOR COURT OF LOS ANGELES COUNTY

S. C. No. 64218

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

MAJOR RAYMOND LISENBA, also known as ROBERT S. JAMES,
Defendant.

AFFIDAVIT IN OPPOSITION TO AFFIDAVITS FILED IN SUPPORT OF
MOTION FOR NEW TRIAL

STATE OF CALIFORNIA,

County of Los Angeles, ss.:

Eugene D. Williams, being first duly sworn, deposes and says: That he is a Deputy District Attorney of the County of Los Angeles, State of California, and one of the deputies who represented the People in the trial of the above entitled cause.

In reference to the matter of the bringing into the Courtroom of two live rattlesnakes, affiant says that said snakes were brought into Court for the purpose of being identified, and were identified, as the identical snakes sold and delivered to the defendant Hope, who purchased them at the instance and direction of the defendant James for the purpose of using them, or one of them, to bite the foot of Mary James, the victim, in order to bring about her death. Said snakes were brought into the Courtroom in a glass case covered with a cloth so they could not be seen, and were offered and received in evidence as soon as was convenient possible after having been brought into Court. Neither affiant nor any other person connected with the prosecution of this case produced said snakes for the purpose of inflaming the minds of the jurors, but they were brought into Court and offered and received in evidence as instruments actually purchased for the purpose of killing the victim and one of which was actually used in an effort to do so. Affiant was in the Courtroom at the time the snakes were brought in, and there was not, to the knowledge of affiant, any "wave of terror" or "exclamations of fright", nor was there any extraordinary or unusual commotion among the spectators and none among the jurors. The only reaction of the audience that was ob-

served by affiant was the natural curiosity caused by the rattling of the snakes and the desire of some of the spectators to see what was causing the sound. The entire matter of bringing the snakes into Court and dealing with them in the presence of the jury was handled in as unostentatious a way as was possible, and affiant personally suggested that the snakes should be removed from the Court room as soon as was reasonably convenient after they had been exhibited to the jury. Thereafter the snakes were again brought into the Courtroom at the request of the defendant and his counsel, and the same amount of rattling and the same amount of commotion among the spectators took place as took place at the time when the snakes were brought in at the direction of affiant. Affiant then was and now is of the opinion that said snakes having been chosen [fol. 2741] as the instrument of death by the defendant himself, and one of them actually having been used for that purpose, it was the duty of affiant to bring said snakes into the Courtroom and exhibit them to the jury so that the jurors might know the means used by the defendant in accomplishing the murder of which he was convicted.

A. Pierce Artran did, at the request of the affiant, remove one of the snakes from its case and examine the mouth and throat of said snake for the purpose of determining its physical condition, and thereafter said Artran testified as a herpetologist and expert on snakes. The examination of the snake was made by Artran because the question of the possible length of life of a rattlesnake in captivity was injected into the case by testimony produced by the defendant, and the physical condition of a snake, according to experts consulted by affiant, including said Artran, is a matter which affects its length of life in captivity. Snakes are sometimes affected by a disease which affects the throat and mouth, and it was considered advisable by affiant to determine whether the snakes involved in this case suffered from such disease. Such was the purpose of having the snake removed from the box and examined. This examination took place during a noon recess of Court; there were no members of the jury present; the snake did not escape, but was drawn from the box on to the floor and then promptly pinned down with an appropriate instrument to enable Artran to pick it up and examine its mouth. After [fol. 2742] such examination had been completed the snake was promptly returned to the box.

With reference to the magazine article appearing in "Liberty", affiant directs the attention of the Court to matters which were taken up in open Court concerning said article and which were substantially as follows: That the Court directed the jurors not to read said article; that thereafter counsel for the defendant called Scott Littleton to the stand and endeavored to cross-examine him with reference to said article, all of which appears in the record. If any prejudice was suffered by the defendant by reason of said article it was brought about by the conduct of defendant's counsel in bringing the matter and some of the alleged contents of said article to the attention of the jury over the objection of the District Attorney.

Affiant was present at the time of the altercation which took place between the witness Southard and Mr. Clark. It is true that Southard did make an offensive remark to Clark and stated that if Clark were not such an old man he would beat him up, or words to that effect. Affiant immediately stepped between Southard and Clark and directed Southard to leave the Courtroom which Southard did; thereupon Clark proceeded to make an inflammatory speech in which he stated that he would kill Southard, that he would come into Court armed at the next session of the Court and that if Southard appeared in Court again the [fol. 2743] District Attorney would have to hire a new investigator as he, Clark, intended to shoot Southard on sight. All of this happened after adjournment of Court, after the jurors had left the Courtroom, and was not in the presence of the jury or any of the jurors. If an atmosphere of terror was thrown around the Courtroom by reason of such conduct the terror was caused by the threats of Clark to kill Southard, as such threats were the only threats that were made.

With reference to the alleged newly discovered evidence brought to the attention of defendant's counsel through a letter received from a person at Pike's Peak, affiant states that said letter was exhibited to the judge and to counsel and to affiant by counsel a number of days before the completion of the taking of evidence in the case, and that no application for a commission to take deposition was ever made; that so far as affiant knows no effort to ascertain whether the witness would testify as indicated by the letter was ever made; there was no showing that such witness would so testify, or that said letter was in fact sent by a

person who intended to testify, and, in addition thereto, said evidence, if it exists, was merely cumulative of the testimony of the defendant himself.

Eugene D. Williams.

Subscribed and sworn to before me this 13th day of August, 1936. L. E. Lampton, County Clerk, by F. R. Cummings, Deputy. (Seal.)

[fol. 2744]

Instructions

Defendant's Instructions No. —

The burden devolves upon the prosecution to prove the voluntary character of a confession. In this case, the prosecution assumed to do so. Upon production of the proof, however, the defendant questioned the voluntary character of the confession alleged to have been made and ~~asked to introduce evidence concerning the same and did~~ introduced evidence which, if true, shows that such confessions to have been involuntary. ~~If there had been no conflict of proof, it would have been the duty of the Court to exclude such confession from you entirely.~~ After all the proof on the subject had been introduced, however, there was a conflict of evidence as to the character of the confessions as being voluntary or involuntary. Under the circumstances it became the duty of the Court to receive such confessions and submit them to you for your consideration, instructing you, however, as to the law concerning them.

Given as modified, Fricke, Judge.

~~Refused, —, Judge.~~

[fol. 2745] Defendant's Instruction No. —

¹ You are instructed that confessions made by the accused under the promise or encouragement of any hope or favor made or held out to him by officers or other persons in authority or by a private person in their presence, are not voluntary and therefore are not admissible. So, in this case unless the prosecution has shown that the alleged confession made by the defendant were not made under the promise or encouragement of any such hope or favor made

or held out to him by the investigators of the District Attorney's office, or the Deputy Sheriff working with them, you must disregard such confession entirely.

Given, Fricke, Judge.

~~Refused, —, Judge.~~

Defendant's Instruction No. —

You are instructed that a confession obtained by or made under the influence of threats or fear, being involuntary, is inadmissible and unless you believe, from the evidence, that the confessions of the accused made to Deputy Sheriff Kilian and to Miss Dorothy Adams were not obtained by or made under the influence or threats or fear, you must disregard such confessions entirely.

Given, Fricke, Judge.

~~Refused, —, Judge.~~

[fol. 2746] Defendant's Instruction No. —

The threats which will exclude a confession include acts as well as verbal expressions and if the confession was inspired by threats, the degree of fear inspired is not material provided that it is other fear than that which is produced by the fact that the accused has been charged with a crime and has been arrested and may be punished for the crime.

Given, Fricke, Judge.

~~Refused, —, Judge.~~

Defendant's Instruction No. —

In considering whether the confession were freely and voluntarily obtained, it is necessary that you should take into consideration the time, the place, the party to whom and the circumstances under which the said confessions were made. In doing so you must consider all the conduct of the parties who were present when the confession was made, not only at the time of such conduct, but at all times while the defendant was under their custody, control or

dominion or were able to exercise or apparently exercise authority over him.

[fol. 2747] Given, Fricke, Judge.

~~Refused, —, Judge.~~

Defendant's Instruction No. —

A confession will be received if it was, in fact, voluntary although it appears that prior thereto and after his arrest accused had been threatened or promises had been made without success for the purpose of procuring a confession. But where threats, force, violence, torture, intimidation, hope of reward or promise of immunity has been used, whether successfully or not, it must affirmatively be shown that a subsequent confession was not caused thereby if the influence of any promise, threat, force, violence, intimidation, torture, hope of reward, or promise of immunity is promised to continue until it is affirmatively shown to have been removed.

Given, Fricke, Judge.

~~Refused, —, Judge.~~

[fol. 2748] You are instructed that, before you can consider any confession of the defendant as evidence against him, if you find that the defendant has made a confession, you must believe that such confession was freely and voluntarily made, and was not the result of inducement, coercion, intimidation, threats, violence, promises or duress exercised by any officer of the law, or any other person, upon the defendant. Unless you believe that such confession was freely and voluntarily made by the defendant, with full knowledge of its meaning and effect, then you must disregard such confession entirely from your consideration. If, on the other hand, you determine that the state has established the fact that the defendant made a confession and that it was freely and voluntarily made by the defendant, then, under these circumstances, you may consider the confession for all purposes in the case and give to it the same

consideration that you would give to any other evidence in the case.

Peo. v. Lebew, 209 Cal. 336 at 342.

~~Given as modified.~~

~~Refused~~, Fricke, Judge.

[fol. 2749] You are further instructed that in considering the question of the free and voluntary character of a confession, that any secret hope possessed by a person who makes a confession, which hope is a product of the mind of the defendant making a confession and was not created by an officer or official, will not render a confession so made by one entertaining such hope inadmissible or invalid. Such a confession may be considered by you the same as any other evidence in the case.

~~Given as modified.~~

~~Refused~~, Fricke, Judge.

[fol. 2750] Defendant's Instruction No. —

If from the evidence you believe that the defendant was arrested by investigators of the District Attorney's Office, including Investigators Southard and Griffin, that he was, shortly after his arrest, taken to the District Attorney's office and there kept; that he was not then taken before any magistrate nor was any criminal charge then pending against him and that no warrant had been issued for his arrest; and if you further believe that, having been taken to the District Attorney's Office and interrogated and he, having not then confessed to the crime of murder of his wife, that he was thereupon taken back to a house close to where he had formerly been living, and was held there and questioned by the officers during the remainder of that day and during that night, and if you further believe that the defendant had no friend or attorney present while he was being so questioned and that the officers who were exercising authority over him took turns at rest but that no rest or repose was permitted the defendant during that night; that the following day he was taken out in the custody of such investigators, together with a police officer, and that he pointed out where he understood Madge Reed to live, and

that he was thereafter taken to the District Attorney's office and was again returned to the private house, he not having, in the meantime — taken before any magistrate and no charge having been preferred against him, and no warrant [fol. 2751] having been issued for his arrest, and if you believe that he was held at such house all the succeeding night and upon the following day was taken to the District Attorney's office, again questioned, and then taken to the County Jail, and if you believe that one of his answers having displeased Jack Southard during the time he was held in such house and that until he had been booked at the County Jail, he was not permitted to undress nor given any opportunity for rest and repose, and if you further believe that when he had been taken to the County Jail and booked, he had made no confession, and if you believe, also, that upon the second of May he was taken from his cell in the County Jail to another room therein where he was confronted with Charles Hope and that Officer Killian, Mr. Range and Mr. Williams were all present and that Mr. Williams was present for the purpose of taking down in shorthand whatever the defendant might say and that Mr. Williams was then known to defendant to be a Deputy District Attorney, and a Deputy District Attorney endeavoring to convict this defendant of the crime of murder, and if you also believe that the defendant was then informed by the said Eugene Williams that Charles Hope had made a statement accusing this defendant of the murder of this defendant's wife and that the said Eugene Williams, in making the said statement told the defendant in substance that Hope claimed that the defendant had killed his wife, Mary James by dthrowning her in the bathtub after having first endeavored to kill her by having a rattle snake bite her, and if you believe [fol. 2752] that the defendant, having then made no confession, that the said Eugene Williams, Jack Southard and others retired to the District Attorney's office for conference and that thereafter they obtained an order of the Court for the taking of the defendant out of the County Jail and that he was taken by the said officers, or some of them, to the place where his wife had met her death and was returned to the District Attorney's office about 3 o'clock P. M. for questioning and that he had made no confession until that time and that he was questioned at the District Attorney's office by various parties until about the hour of midnight

or thereafter and that he had had nothing to eat since morning and no opportunity to sleep, and that he had requested the presence of his attorney and that no attorney representing him was present, and that, having been without anything to eat until the hour of midnight and there having been no information given him as to when his questioning would end, and if you believe that shortly after midnight of said day the defendant made a statement, in substance that he would make a confession if they would give him something to eat, and that thereupon he was taken out in the custody of Deputy Sheriffs Killian and Gray and permitted to eat and that immediately thereafter he made the said confession, then upon the foregoing facts, I instruct you as a matter of law that the confessions made under such circumstances, are not regarded as legal proof and must be entirely disregarded by you in reaching your verdict.

Formula instruction—principles of law covered by instructions given also does not include all of the attendant facts.

Given: —, Judge.

Refused: Fricke, Judge.

Defendant's Instruction No. —

If the defendant was struck by one or more of the investigators of the District Attorney, while he was in their custody or while they appeared to be exercising authority over him, it is immaterial whether such blow was struck for the purpose of obtaining a confession from this defendant of the crime here charged, or some other crime. The defendant had a right to fear, and is presumed to have feared that unless he made such statements to his custodians as they desired in regard to any accusations which they made against him, further force and violence would be used. A confession made under such apprehension is not voluntary.

Given: —, Judge.

Covered by Instruction—Given: — — —, Refused: Fricke, Judge.

[fol. 2754] Defendant's Instruction No. —

If, while efforts were being made to obtain a confession from the defendant he was struck by one of those having

him in custody, or appearing to exercise authority over him, the prosecution will not be permitted to say that such blow was not struck for the purpose of obtaining a confession.

Given, —, Judge.

Denied--Not the Law.

Refused: Fricke, Judge.

Defendant's Instruction No. —

The fact that a confession is obtained by the promise of some collateral benefit does not as a rule exclude it, as otherwise it is voluntary and admissible but you are instructed in this connection that the promise of a meal under the circumstances existing at the time the defendant first promised to confess, is not collateral.

Given, —, Judge.

Covered.

Refused: Fricke, Judge.

[fols. 2755-2756] Defendant's Instruction No. --

If you find from the evidence that while the defendant gave some answer displeasing to Jack Southard while the defendant was being held by deputies of the District Attorney in their efforts to obtain a confession from him, you are instructed that such violence so used renders inadmissible a confession subsequently made at any time when the said Jack Southard appeared to have authority or to be one of those having authority, custody or control of the defendant, unless it affirmatively appears that defendant was given such assurance of no further violence as to be sufficient to remove all fear thereof from the mind of a person of that violence.

Admissibility of confession never depends upon one but does depend upon all of the circumstances. Instruction does not correctly state the law. Rules applicable covered by instructions given.

Given, —, Judge.

Refused: Fricke, Judge.

[fol. 2757] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO
RELY AND DESIGNATION OF PORTIONS OF THE RECORD TO BE
PRINTED—Filed June 22, 1940

Received copy of within document Jun. 20, 1940. Earl
Warren, Attorney General. By Frank Richards, Deputy.

[fol. 2757-1] To the Honorable Supreme Court of the United
States:

In compliance with paragraph 9 of Rule 13, Rules of
the United States Supreme Court, appellant intends to rely
upon the following points and grounds:

I

That the bringing of live, hissing rattlesnakes into a
courtroom and exhibiting them to a jury was so inflamma-
tory and frightening in its nature as to make of the trial
a mock and sham and violate the fundamental guarantee of
due process of law guaranteed by the Fourteenth Amend-
ment to the Constitution of the United States.

II

. That the bringing of live, hissing rattlesnakes into a
courtroom and exhibiting them to a jury was so inflamma-
tory and frightening in its nature as to make of the trial
a mock and sham, and denied to the appellant the equal pro-
[fol. 2757-2] tection of the laws guaranteed by the Four-
teenth Amendment to the Constitution of the United States.

III

That third degree brutal methods were used upon the
defendant Lisenba (Robert S. James) to coerce and extort
a purported confession, and that the use of such alleged
confession obtained by such means and methods make void
the entire trial under the due process clause of the Four-
teenth Amendment to the Constitution of the United States.

IV

That third degree brutal methods were used upon the
defendant Lisenba (Robert S. James) to coerce and extort

a purported confession, and that the use of such alleged confession obtained by such means and methods denied to the appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

V

That prolonged questioning without sleep and under tortuous mental ordeal, similar to that employed in the dark ages, and in the torture chamber, were used upon the defendant, and statements thus extorted and coerced were permitted in evidence in the trial. That the use of the alleged confession in evidence obtained by these methods was in [fol. 2757-3] violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

VI

That prolonged questioning without sleep and under tortuous mental ordeal, similar to that employed in the dark ages, and in the torture chamber, were used upon the defendant, and statements thus extorted and coerced were permitted in evidence in the trial. That the use of the alleged confession in evidence obtained by these methods denied to the appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

VII

That the principal evidence against the defendant was that of an alleged accomplice named Charles H. Hope. That since the trial the said Charles H. Hope has made affidavits and filed the same in the Superior Court of Los Angeles County, stating that his testimony was obtained by deceit, fraud, collusion and coercion and was entirely false; that he was impelled by force and fear, threats and promises and that all these facts, including the falsity of his statements, were known to the prosecution and participated in by them. That testimony thus obtained and the conviction based thereon make a trial a mere pretense and are all in violation [fol. 2757-4] of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

VIII

That the principal evidence against the defendant was that of an alleged accomplice named Charles H. Hope. That

since the trial the said Charles H. Hope has made affidavits and filed the same in the Superior Court of Los Angeles County, stating that his testimony was obtained by deceit, fraud, collusion and coercion and was entirely false; that he was impelled by force and fear, threats and promises and that all these facts, including the falsity of his statements, were known to the prosecution and participated in by them. That testimony thus obtained and the conviction based thereon make a trial a mere pretense and denied to the appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

IX

That alleged evidence of another purported offense in another state was presented in the trial of this case, without any indictment, information or judgment thereon and without any jurisdiction of the California court of the subject matter therein, and that said use of said testimony placed the defendant upon trial in California before a California [fol. 2757-5] jury on such purported offense, and is in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

X

That alleged evidence of another purported offense in another state was presented in the trial of this case, without any indictment, information or judgment thereon and without any jurisdiction of the California court of the subject matter therein, and that said use of said testimony placed the defendant upon trial in California before a California jury on such purported offense and denied to the appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

XI

That Major Raymond Lisenba was unlawfully imprisoned and isolated in a private building for three nights and days, before being lodged in any jail; that he was then held practically incommunicado for eleven days, and almost incessantly questioned by officers until the alleged confession was given, and that the use thereof in evidence in the trial was in violation of due process of law guaranteed by

the Fourteenth Amendment to the Constitution of the United States.

XII

That Major Raymond Lisenba was unlawfully imprisoned [fol. 2757-6] and isolated in a private building for three nights and days, before being lodged in jail; that he was then held practically incommunicado for eleven days, and almost incessantly questioned by officers until the alleged confession was given, and that the use thereof in evidence in the trial denied to the appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

XIII

That the repeated taking of defendant Lisenba from jail without his attorney and against his consent and to the office of the district attorney and other places and after prolonged questioning without food and without rest, and thereafter extorting a purported confession which was used in the case against appellant, was in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

XIV

That the repeated taking of defendant Lisenba from jail without his attorney and against his consent and to the office of the district attorney and other places and after prolonged questioning without food and without rest, and thereafter extorting a purported confession which was used [fol. 2757-7] in the case against appellant, denied to the appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Appellant designates the following portions of the record to be printed:

Partial clerk's transcript designated page 2307, etc., of the record, and ending at page 2372;

The following portions of the reporter's transcript of testimony:

The testimony of Mrs. Viola Pemberton, p. 17, line 6 to p. 29, line 9 incl.; p. 32, lines 23-24; p. 33, lines 21-25; p.

34, line 12 to p. 45, line 24 incl.; p. 46, line 22 to p. 52, line 23, incl.;

The testimony of James Pemberton, p. 54, line 11 to p. 100, line 12 incl.; then p. 100, line 20;

The testimony of John P. Toohey, p. 101, line 8 to p. 102, line 21; p. 103, line 15 to p. 113, line 9; p. 113, line 20 to p. 114, line 11;

The testimony of Charles H. Hope, p. 135, line 5 to p. 156, line 8 to and including the word "yes"; p. 157, line 13 to p. 186, line 13 incl.; p. 187, line 8 to p. 189, line 20;

The testimony of Dr. A. F. Wagner, p. 191, line 1 to p. 192, line 1 incl.; p. 192, lines 13-15 incl.; p. 193 line 1 to p. 210, line 10; p. 211, line 11 to p. 212, line 21; p. 212, line 25 [fol. 2757-8] to p. 213, line 17; p. 220, lines 21-23 incl.; p. 227, line 14 to p. 228, line 15; p. 229, line 26 to p. 230, line 9;

Charles H. Hope cross examination, p. 261, line 3 to p. 266, line 15; p. 266, line 22 to p. 267, line 5; p. 267, line 9 to p. 268, line 2; p. 269, line 2 to p. 271, line 8; p. 272, line 4 to p. 275, line 18; p. 277, line 20 to p. 285, line 6; p. 285, line 13 to line 17; p. 285, line 23 to p. 292, line 21; p. 310, line 4 to p. 335, line 10; p. 336, line 10 to p. 360, line 16; p. 361, line 2 to line 8; p. 361, line 14 to p. 362, line 1; p. 362, line 7 to p. 364, line 14; p. 364, line 20, to p. 372, line 22;

Objections to rattlesnakes being exhibited to the jury, p. 464, line 13 to p. 465, line 22;

Charles H. Hope, cross examination, p. 466, line 1 to p. 478, line 7; p. 480, line 10 to p. 486, line 23;

Stipulation and order making "snake man" a deputy court clerk for the custody of rattlesnakes, p. 559, line 19 to p. 561, line 10;

Testimony of J. D. Rogers, p. 612, line 12 to p. 618, line 12;

People's offer of proof of alleged offenses committed by the defendant in Colorado in 1932, p. 620, line 18 to p. 623, line 14;

Defense objections to offer of proof and argument of counsel, p. 623, line 22 to p. 625, line 7; p. 666, line 5 to [fol. 2757-9] p. 667, line 13; p. 682, line 3, the words "Mr. Clark," only; p. 685, line 14 to p. 687, line 10; p. 693, line 20 to p. 694, line 24;

Court's ruling admitting evidence to support offer of proof, p. 694, line 24 to p. 695, line 8 incl.;

Testimony of J. D. Rogers, p. 696, line 15 to p. 728, line

21; p. 729, line 11 to p. 739, line 13; p. 743, line 6 to p. 744, line 21; p. 745, line 16 to p. 793 through line 26;

Testimony of Miss Grace Yarnell, p. 794, line 5 to p. 801, line 14; p. 804, line 15 to p. 805, line 7; p. 805, line 17 to p. 806, line 13; p. 808, line 8 to p. 813, line 21; p. 814, line 15 to p. 824, line 6; p. 824, line 11 to p. 830, line 8; p. 831, line 1 to p. 836, line 2; p. 837, line 10 to p. 862, line 18; p. 864, line 12 to p. 871, line 5; p. 877, line 21 to p. 884, line 3; p. 886, line 6, to p. 889, line 8; p. 890, line 5, to line 16;

Testimony of Alva E. Custer, p. 890, line 19 to line 23; p. 891, line 4 to p. 901, line 20;

Testimony of Mrs. Irene F. Snyder, p. 902, line 1 to p. 911, line 15;

Testimony of C. A. Pries, p. 927, line 1 to line 6; p. 927, line 13 to p. 930, line 7; p. 932, line 21 to p. 940, line 9; p. 951, line 16 to p. 956, line 24 incl.;

Testimony of Dr. A. F. Wagner, p. 970, line 5 to p. 972, line 9; p. 990, line 9 to line 21; p. 991, line 10 to p. 992, line 8; p. 993, line 4 to p. 1001, line 26 incl.; p. 1002, line 13 to p. 1003, line 4;

[fol. 2757-10] Cross examination of Charles H. Hope, p. 1039, line 14 to p. 1041, line 13; p. 1043, line 11 to p. 1045, line 20; p. 1046, line 4 to line 22; p. 1047, line 1 to p. 1051, line 7; p. 1052, line 10 to p. 1053, line 13;

Testimony of Miss Grace Yarnell, p. 1062, line 8 to p. 1063, line 9;

Testimony of Edward F. Lynch, p. 1063, line 10 to p. 1067, line 4 incl.;

Defense objections to reading alleged confession to the jury, p. 1067, line 5 to line 15;

Testimony of Edward F. Lynch, p. 1067, line 16 to p. 1084, line 22;

Testimony of Dr. James Dewitt George, p. 1085, line 1 to p. 1088, line 11;

Testimony of J. C. Southard, p. 1088, line 12 to p. 1100, line 3; p. 1101, line 6 to p. 1105, line 25; p. 1106, line 15 to p. 1115, line 3; p. 1117, line 11 to p. 1118, line 12; p. 1119, line 21 to p. 1123, line 12; ;

Testimony of Samuel J. Silverman, p. 1123, line 14 to p. 1128, line 19;

Testimony of Robert S. James, p. 1130, line 11 to p. 1151, line 3; p. 1152, line 15 to p. 1161, line 8; p. 1166, line 26 to p. 1173, line 16;

Testimony of Dr. George B. Gilmore, p. 1175, line 11 to p. 1179, line 4;

Testimony of Ethel Smith, p. 1184, line 1 to p. 1187, line 12;

[fol. 2757-11] Testimony of Dr. Paul E. Bowers, p. 1246, line 10 to p. 1248, line 4; p. 1249, line 16 to p. 1251, line 14; p. 1253, line 7 to p. 1255, line 12;

Testimony of Dr. Charles Decker, p. 1297, line 12 to p. 1312, line 5; p. 1314, line 7 to p. 1341, line 24.

Testimony of Charles Griffen, p. 1432, line 13 to p. 1434, line 26 incl.; p. 1436, line 4 to p. 1437, line 23; p. 1438, line 25 to p. 1440, line 25; p. 1442, line 14 to line 17 incl.; p. 1443, line 1 to p. 1465, line 15; p. 1467, line 10 to p. 1474, line 4;

Testimony of Everett Davis, p. 1481, line 17 to p. 1490, line 24;

Testimony of Robert P. Stewart, p. 1491, line 3 to p. 1502, line 15; p. 1503, line 11 to p. 1504, line 15;

Testimony of Harry Dean, p. 1511, line 1 to p. 1512, line 3; p. 1513, line 6 to p. 1518, line 4; p. 1519, line 3, to p. 1526, line 20;

Testimony of Alfred Dinsley, p. 1630, line 20 to p. 1634, line 23; p. 1664, line 24 to p. 1667, line 4; p. 1667, line 18 to p. 1669, line 18; p. 1670, line 6 beginning with the words "I will ask" to p. 1670, line 19; p. 1670, line 22 to p. 1671, line 14;

Testimony of J. C. Southard, p. 1671, line 15 to line 17; p. 1674, line 1 to p. 1678, line 15;

Testimony of Willard L. Killion, p. 1678, line 17 to p. 1688, line 4; p. 1688, line 18 to p. 1695, line 7;

[fol. 2757-12] Testimony of C. W. Maples, p. 1697, line 4 to line 17;

Testimony of Edward F. Lynch, p. 1699, line 1 to p. 1700, line 6;

Testimony of Willard L. Killion, p. 1706, line 1 to line 22;

Ruling of the Court admitting alleged confession in evidence, p. 1708, line 5 to line 26, incl.;

Testimony of Willard L. Killion, p. 1709, line 7; line 18 to p. 1710, line 22;

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Testimony of Edward F. Lynch, p. 1709, line 7 to line 13; line 18 to p. 1710, line 10; p. 1710, line 14 to p. 1712, line 24; p. 1713, line 10 to p. 1727, line 4;

Testimony of Dorothy Adams, p. 1727, line 15 to p. 1764, line 23;

Testimony of Charles H. Hope, recalled, p. 1767, line 14 to p. 1777, line 3; p. 1778, line 8 to line 21;

Testimony of Willard L. Killion, p. 1779, line 1 to p. 1796, line 11;

Motion to strike, p. 1864, line 3, words "Mr. Clark" only; line 8 to p. 1867, line 3; p. 1867, line 18 to p. 1868, line 9; p. 1868, line 15 to p. 1882, line 8;

[fol. 2757-13] Testimony of Joe Houtenbrink, p. 1885, line 20 to p. 1894, line 16;

Testimony of Frank Weinberg, p. 1895, line 7 to line 11; p. 1904, line 12 to line 19; p. 1907, line 26 to p. 1908, line 15; p. 1909, line 18;

Testimony of Mrs. Eva Murphy, p. 1921, line 23 to p. 1935, line 3;

Testimony of Mrs. Pearl Wier, p. 1941, line 10 to p. 1946, line 19;

Testimony of Charles Martin, p. 1947, line 1 to p. 1952, line 18;

Testimony of Robert S. James, p. 2034, line 1 to p. 2050, line 6; p. 2051, line 6 to p. 2082, line 6; p. 2083, line 5 to p. 2093, line 16; p. 2110, line 15 to p. 2114, line 7; p. 2115, line 11 to p. 2118, line 19; p. 2121, line 6; p. 2124 line 1 to p. 2126, line 14; p. 2126, line 24 to p. 2128, line 17; p. 2140, line 25 to p. 2141, line 24; p. 2142, line 24 to p. 2153-c, line 8; p. 2160, line 12 to p. 2163, line 13; p. 2177, line 1 to line 23; p. 2184, line 4 to p. 2186, line 1; p. 2187, line 16 to p. 2187, line 21; p. 2212, line 14 to p. 2213, line 8; p. 2237, line 8 to p. 2240, line 5; p. 2271, line 23 to p. 2277, line 7; p. 2277, line 24 to p. 2280, line 14; p. 2292, line 5 to line 18.

[fol. 2757-14] Complete opinion and judgment of the Supreme Court of California and the dissenting opinion, starting with p. 2611, until the conclusion;

Opinion and judgment of the Supreme Court of California and dissent, p. 2703 to the conclusion;

Petition for rehearing commencing on p. 2385 to conclusion;

Order denying rehearing, p. 2560;

Remittitur, p. 2561;

Petition for Appeal, Assignment of Errors, Prayer for Reversal, Order Allowing Appeal, Order Staying Execution, p. 2567 to p. 2578, inclusive;

Certificate of Chief Justice of California, commencing on p. 2582 to p. 2589, inclusive;

Statement on jurisdiction, p. 2589 to conclusion on p. 2724;

Entire clerk's transcript indexed, commencing on p. 2309 and containing the indictment, the minute order of arraignment, the plea, all affidavits in support of motion for a new trial, indexed generally at p. 2309 and separately numbered, p. 160, et seq. of clerk's transcript.

Certificate of Probable Cause, p. 203-204.

Morris Lavine, Attorney for Appellant.

[fols. 2757-15-2758] [File endorsement omitted.]

[fol. 2758-1] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed July 11, 1940

To the Honorable Supreme Court of the United States:

Appellant, Major Raymond Lisenba, (also known as Robert S. James), and appellee, The People of the State of California, are desirous of having before this Honorable Court a complete transcript of all portions of the record which they deem proper and necessary to the cause herein; and

Therefore, it is Hereby Stipulated that the copy attached hereto of the Affidavit of Eugene D. Williams, a Deputy District Attorney of the County of Los Angeles, State of California, and one of the deputies who represented the People in the trial of the above entitled cause, which affidavit was filed in the trial court in opposition to the affidavits filed by appellant herein in support of his motion for a new trial, and which affidavits have heretofore been made and now are part of the record on appeal herein, and the copy attached hereto of certain instructions given and refused [fol. 2758-2] by the trial court to the jury may be certified to by the Clerk of the Supreme Court of the State of California as being full, true and correct copies of said affidavit and instructions as they appear in the Clerk's Transcript of the proceedings had in the trial of said cause and thereupon be transmitted by said Clerk to the above entitled Court for the purpose of being made a part of the record herein; and

It is Further Stipulated that said certified copies of said affidavit and instructions become a part of said record and that, if necessary, a suitable order be made by the above entitled court permitting said certified copies of said affidavit and instructions to be incorporated into and made part of and included in the transcript of the record now on file in this Honorable Court.

Dated: This 8th day of July, 1940.

Morris Lavine, Attorney for Appellant; Earl Warren, Attorney General of the State of California, by Frank W. Richards, Deputy Attorney General, Attorneys for Appellee.

[fol. 2758-3] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Crim. No. 4068

MAJOR RAYMOND LISENBA, (Also known as Robert S. James), Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, Appellee

Order

It is Hereby Ordered that the Clerk of this Court make the proper certification on the affidavit and instructions mentioned in the stipulation between appellant and appellee, (a copy of the stipulation being filed herewith), and thereupon transmit the certified copies thereof to the Honorable Supreme Court of the United States for the purpose of being made a part of the transcript of the record now on file in said court.

Dated the 9th day of July, 1940.

Gibson, Chief Justice.

[fols. 2758-4-2759] [File endorsement omitted.]

[fol. 2759-1] IN SUPREME COURT OF THE UNITED STATES
APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF THE RECORD
TO BE PRINTED—Filed July 13, 1940

Comes now the People of the State of California, appellee herein, and designates the following portions or parts

of the record, which it thinks material, to be printed in addition to the portions or parts designated by appellant herein:

1. Testimony of A. L. Hutchison, page 115 lines 8 to 20 inclusive; page 119 line 6 to page 120 line 15 inclusive;

2. Testimony of Dr. A. F. Wagner, page 221 line 6 to page 222 line 3 inclusive;

3. Testimony of Dr. Gustave F. Boehme, page 230 line 21 to page 235 line 21 inclusive; page 241 line 8 to page 243 line 12 inclusive; page 243 line 18 to page 253 line 18 inclusive; [fol. 2759-2] clusive; page 256 line 15 to page 257 line 25 inclusive;

4. Testimony of Mrs. Edna Hope, page 373 line 14 to page 374 line 20; page 374 line 25 to page 383 line 6, inclusive;

5. Testimony of Mrs. Ethel Smith, page 384 lines 17 to 24 inclusive; page 385 line 7 to page 387 line 3; page 389 lines 2 to 25 inclusive; page 390 line 15 to page 391 line 3 inclusive; page 392 line 11 to page 393 line 4 inclusive; page 394 line 24 to page 395 line 19 inclusive;

6. Testimony of Charles Griffen, page 398, line 21 to page 400, line 8 inclusive;

7. Testimony of Roland H. Kirby, page 400 line 20 to page 401 line 24 inclusive; page 402 line 12 to page 403 line 1 inclusive; page 408 line 16 to page 409 line 8;

8. Testimony of Mike Allman, page 414 line 8 to page 419 line 3 inclusive;

9. Testimony of Irving Sherman, page 428 lines 8 to 24; page 429 line 12 to page 430 line 9;

10. Testimony of Joe Houtenbrink, page 466 lines 8 to 22 inclusive; page 467 line 13 to page 470 line 16, ending with words, "snakes from him"; page 470 line 23 to page 471 line 7, inclusive; page 472 line 18 to page 473 line 17;

11. Testimony of Lois Wright, page 487 lines 8 to 17 inclusive; page 490 line 9 to page 491 line 23;

12. Testimony of Sam Grant, page 492 line 26 to page 494 line 25;

[fol. 2759-3] 13. Testimony of Louis Berry, page 496 line 8 to page 508 line 20, inclusive; page 509 lines 5 to 20 inclusive; page 509 line 25 to page 510 line 3 inclusive;

14. Testimony of Max Galatz, page 518 line 9 to page 521 line 1 inclusive; page 521 line 21 to page 523 line 14; page 524 line 15 to page 533 line 24 inclusive; page 535 lines 6 to 14 inclusive;

15. Testimony of Gene Waddle, page 551, line 8 to page 555 line 24 inclusive;

16. Testimony of Arthur J. Hughes, page 556 lines 17 to 23 inclusive; page 557 lines 2 to 15 inclusive; page 563 line 14 to page 564 line 7 inclusive; page 565 line 24 to page 568 line 16, ending with the word, "Yes"; page 569 lines 4 to 5 inclusive; page 569 lines 9 to 17 inclusive; page 569 line 26 to page 570 line 5 inclusive; page 570 line 23 only; page 571 lines 5 to 6 inclusive; lines 10 to 12 inclusive; line 16 only; lines 20 to 22 inclusive;

17. Testimony of Dr. G. B. Gilmore, page 864 line 2 to page 888 line 22;

18. Testimony of G. B. Dunnington, page 911 line 20 to page 919 line 3;

19. Testimony of Mrs. Madge Reed, page 1006 line 1 to page 1007 line 2; page 1007 line 12 to page 1015 line 11; page 1015 line 26 to page 1019 line 2;

20. Testimony of Willard L. Killion, page 1053 line 17 to page 1055 line 14;

[fol. 2759-4] 21. Testimony of Miss Grace Yarnell, page 1061 line 5 to page 1062 line 5;

22. Testimony of J. C. Southard, page 1075 line 1 to page 1078 line 23;

23. Testimony of Robert S. James, page 1161 lines 9 to 19 inclusive.

24. Testimony of Dr. Paul E. Bowers, page 1248 line 5 to page 1249 line 15; page 1267 line 20 to page 1271 line 19; page 1273 lines 4 to 13 inclusive; page 1273 line 18 to page 1286 line 6;

25. Testimony of Dr. Charles Decker, page 1312 lines 5 to 24 inclusive;

26. Testimony of Charles Griffin, page 1438 lines 15 to 20 inclusive; page 1466 lines 17 to 25 inclusive;

27. Testimony of Jack Williams, page 1474 line 7 to page 1476 line 26;

28. Testimony of W. G. Phillips, page 1479 line 6 to page 1480 line 17;

29. Testimony of Clem Peoples, page 1504 line 19 to page 1506 line 7;

30. Testimony of Harry Dean, page 1512 line 4 to page 1513 line 2;

31. Testimony of J. C. Southard, page 1671 line 18 to page 1673 line 11;

32. Testimony of Edward F. Lynch, page 1709 line 7 to page 1713 line 6;

[fol. 2759-5] 33. Testimony of William L. Killion, page 1713 line 10 to page 1727 line 3;

34. Testimony of Joe Houtenbrink, page 1885 lines 1 to 18 inclusive;

35. Testimony of Robert S. James, page 2050 lines 6 to 22 inclusive; page 2128 line 18 to page 2131 line 5; page 2132 lines 2 to 15 inclusive; page 2133 line 16 to page 2140 line 24; page 2154 line 16 to 2160 line 11; page 2163 line 14 to page 2166 line 8; page 2166 line 15 to page 2167 line 8 inclusive; page 2167 line 15 to page 2170 line 23; page 2171 line 19 to page 2172 line 15;

36. Testimony of Scott Littleton, page 2187 lines 10 to 15 inclusive;

37. Testimony of Robert Herron, page 2197 line 1 to page 2198 line 5;

38. Testimony of Edward F. Lynch, page 2198 line 10 to page 2204 line 26;

39. Testimony of Jack Southard, page 2240 lines 13 to 22 inclusive; page 2244 lines 9 to 15 inclusive;

40. Testimony of Carl H. Seobie, page 2246 line 1 to page 2271 line 22; page 2277 lines 7 to 23 inclusive.

41. Affidavit of Eugene D. Williams filed in opposition to affidavits filed in support of motion for new trial, page 2739 line 1 to page 2743 line 25 inclusive;

42. Instructions given, page 2744 line 1 to page 2749 line 14 inclusive;

[fol. 2759-6] 43. Instructions refused, page 2750 line 1 to page 2755 line 20 inclusive.

Dated this 10th day of July, 1940.

Earl Warren, Attorney General of the State of California, and Everett W. Walton, Assistant Attorney General, Attorneys for Appellee.

[fol. 2759-7] Rec'd Copy of within, July 10, 1940.

Morris Lavine, by H. Nesbitt, Atty. for Appellant.

[fol. 2759-8] [File endorsement omitted.]

[fol. 2760] IN SUPREME COURT OF THE UNITED STATES

STIPULATION FOR ADDITIONAL DESIGNATIONS OF APPELLANT
TO BE ADDED TO PRINTED RECORD—Filed July 13, 1940

[fol. 2760-1] It is Stipulated by and between Major Raymond Lisenba, also known as Robert S. James, appellant, and the People of the State of California, appellee, that the following additional designations of the appellant, in view of the appellee's additional designations, shall be added to the printed record, in addition to the portions heretofore designated:

1. Testimony of A. L. Hutchison, page 120, line 25 to page 121, line 5;

2. Testimony of Dr. A. F. Wagner, page 222, line 24 to page 227, line 13;

3. Testimony of Dr. Gustave F. Beehme, page 235, line 21 to page 237, line 9; page 237 lines 17-24; page 254, line 13 to page 256, line 15; page 257, line 25, to page 260, line 18;

4. Testimony of Mrs. Edna Hope, page 383, line 25 to page 384, line 4;

[fol. 2760-2] 5. Testimony of Roland H. Kirby, page 409, line 8 to page 413, line 11;

6. Testimony of Mike Allman, page 419, line 7 to page 421, line 19;

7. Testimony of Joe Houtenbrink, page 466, line 8 to page 478, line 7; page 480, line 10 to page 486, line 23;

8. Testimony of Sam Grant, page 495, lines 1 to 5;

9. Testimony of Louis Berry, page 511, line 6 to page 515, line 13; page 516, lines 21 to 23;

10. Testimony of Max Galatz, page 539, line 11 to page 545, line 7;

11. Objections, page 564, lines 7 to 26, to and including word "overruled"; page 569, lines 18 to 25; page 572, line 2 to page 574, line 12;

12. Testimony of G. B. Dunnington, page 919, line 7 to page 922, line 2;

13. Testimony of Madge Reed, page 1019, line 10 to page 1039, line 7;

14. Testimony of Willard L. Killion, page 1055, line 15 to page 1056, line 15;

15. Testimony of Edward F. Lynch, page 1067, line 16 to page 1075, line 26, incl.;

16. Testimony of J. C. Southard, page 1076, line 1 to page 1084, line 22, incl.;

17. Testimony of Robert S. James, page 1174, lines 2 to 15;

[fol. 2760-3] 18. Testimony of Jack Williams, page 1178, lines 16 to 23;

19. Testimony of W. C. Phillips, page 1480, line 17 to page 1481, line 12;

20. Testimony of Clem Peoples, page 1506 line 7 to page 1508, line 10; page 1510, lines 13 to 22;

21. Testimony of Robert S. James, page 2170, line 13 to 23; page 2175, lines 2 to 9; page 2176, lines 12 to 21;

22. Motion to Strike, page 2206, line 19 to page 2207 line 22;

23. Testimony of Carl H. Scobie, page 2271, line 22 to page 2277, line 7.

Morris Lavine, Attorney for Appellant. Attorney
General Earl Warren, by Frank W. Richards,
Deputy, Attorneys for Appellee.

[fol. 2760-4] [File endorsement omitted.]

[fol. 2761] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 28, 1940

Appeal from the Supreme Court of the State of California.

Treating the appeal papers herein from the Supreme Court of the State of California as an application for a writ of certiorari;

On Consideration Whereof, it is ordered by this Court that the said application for writ of certiorari be, and the same is hereby, granted.

—And it is Further Ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 44,482, California, Supreme Court, Term No. 133, Major Raymond Lisenba, Petitioner, vs. The People of the State of California. Filed June 8, 1940. Term No. 133 O. T. 1940.

